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RULES OF APPELLETTE PROCEDURE

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY 24, 2022

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 29 OCTOBER 2021

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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ASSAULT

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SCHEDULE FOR HEARING APPEALS DURING 2022

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 5, 6
February 14, 15, 16, 17
March 21, 22, 23, 24
May 9, 10, 11, 23, 24, 25, 26
August 29, 30, 31
September 1, 19, 20, 21, 22
October 3, 4, 5, 6

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SHELLEY BANDY, PLAINTIFF AND THIRD-PARTY DEFENDANT

STATE OF NORTH CAROLINA, INTERVENOR–PLAINTIFF

v.

A PERFECT FIT FOR YOU, INC., MARGARET A. GIBSON, AND RONALD WAYNE GIBSON, DEFENDANTS

v.

A PERFECT FIT FOR YOU, INC., APPELLANT/INTERVENOR–DEFENDANT AND THIRD-PARTY PLAINTIFF

v.

MARGARET A. GIBSON, RONALD WAYNE GIBSON, R. WAYNE GIBSON, INC., AND RW & MA, LLC, CROSS-CLAIM AND THIRD-PARTY DEFENDANTS

No. 429A20

Filed 29 October 2021

1. Receivership—attorney fees—authorization—denial—impermissible basis

The trial court abused its discretion in denying a court-appointed receiver's request for authorization to pay an attorney's fees for work performed for the receivership, where the sole basis of the denial was the receiver's and the attorney's failure to obey the trial court's prior order concerning how invoices should be submitted to the court.

2. Attorneys—sanctions—notice and opportunity to be heard—evidentiary support—receivership

The trial court's order denying a court-appointed receiver's request for authorization to pay an attorney's fees for work done for the receivership, when construed as an order imposing sanctions

against the attorney for failure to obey a previous order dictating how invoices should be submitted to the court, was legally deficient where the trial court failed to provide notice and an opportunity to be heard to the attorney being sanctioned, and where the order's finding that the attorney had disobeyed the prior order was unsupported by the evidence.

3. Receivership—attorney fees—authorization—denial—sufficiency of findings

After the trial court denied a court-appointed receiver's request for authorization to pay outside counsel for certain work performed on behalf of the receivership, the trial court erred by denying the receiver's requests for authorization to pay outside counsel for work performed in prosecuting the appeal of that order, where the trial court's denial was based solely on the finding that the fees incurred for the appeal would diminish the receivership's assets.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from final orders entered on 6 November 2019, 6 March 2020, 24 March 2020, 30 April 2020, 29 May 2020, 26 June 2020, 22 July 2020, 14 September 2020, and 5 October 2020 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). This matter was calendared for argument in the Supreme Court on 6 October 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Philip J. Mohr and Brent F. Powell for appellants A Perfect Fit For You, Inc., Douglas M. Goines as Receiver, and the Law Firm of Womble Bond Dickinson (US), LLP.

No brief filed for appellees.

EARLS, Justice.

¶ 1 The question before us is whether the Business Court erred in refusing to authorize the court-appointed receiver for the company A Perfect Fit For You, Inc. (A Perfect Fit) to pay fees to the law firm Womble Bond Dickinson (US), LLP (Womble) for services rendered by one of the firm's attorneys, Philip J. Mohr. The Business Court did not refuse to authorize the receiver to pay Womble's fees on the basis of any finding relating to the nature or quantity of the legal services Mr. Mohr provided. Instead,

the Business Court refused authorization solely on the basis of its conclusion that Mr. Mohr and the receiver had "flagrant[ly] disregard[ed] . . . the requirements imposed by" a previous court order which established the process the receiver and Womble were required to follow when seeking authorization for fee payments.

¶ 2 Appellants argue that the Business Court abused its discretion in refusing to authorize fee payments based upon an assessment of the receiver's and Mr. Mohr's purported lack of compliance with a court order. In the alternative, appellants argue that the Business Court's order should be construed as an order imposing sanctions against Womble without prior notice and an opportunity to be heard, in violation of Womble's due process rights under the Fourteenth Amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution. In addition, appellants also challenge the Business Court's denial of the receiver's subsequent requests for authorization to pay fees for work performed by Womble on its appeal of the orders refusing to authorize fee payments for the services rendered by Mr. Mohr.

¶ 3 We hold that the Business Court's decision to deny authorization for the receiver to pay Womble fees incurred for Mr. Mohr's work was an abuse of discretion. In addition, the Business Court's order could not permissibly impose monetary sanctions on Womble because the record indicates that the party being sanctioned did not have prior notice and an opportunity to be heard. Finally, it was error to deny the receiver's request for permission to pay Womble's fee-litigation fees without making necessary findings specifically regarding the value to the receivership, or lack thereof, of the work which generated these fees. Accordingly, we reverse the Business Court's order refusing to authorize payment of fees to Womble for Mr. Mohr's work and the relevant Business Court orders denying the receiver's request to pay Womble's fee-litigation fees and remand this case to the Business Court for further proceedings not inconsistent with this opinion.

I. Appointment of the receiver and the services rendered by Womble.

¶ 4 In 2016, Shelley Bandy filed a complaint and ex parte request for appointment of a receiver over A Perfect Fit, a medical equipment company located in Carteret County. On the day the complaint was filed, Senior Resident Superior Court Judge Benjamin G. Alford entered a temporary restraining order and an order appointing M. Douglas Goines as the company's receiver. Judge Alford subsequently entered an order granting a preliminary injunction and appointing a receiver which provided that

Mr. Goines would "continue as receiver, vested with full powers granted under statute to take possession of and manage the business, books, and profits of the corporation . . . until further Order of this Court." The matter was later designated a mandatory complex business case and transferred to the North Carolina Business Court.

¶ 5 After taking over A Perfect Fit, the receiver became concerned that the company may have fraudulently billed nearly $12 million in claims to the Medicaid program. The receiver hired Womble to conduct a comprehensive audit of the company's records. The audit revealed that the company lacked sufficient funds to pay back the $12 million the receiver believed the company had fraudulently obtained. Shortly thereafter, the State of North Carolina filed an intervenor complaint against A Perfect Fit seeking to recoup the nearly $12 million in allegedly fraudulent claims. In November 2017, the United States Department of Justice issued a "target letter" advising the company that it was the target of a federal criminal investigation. One month later, the United States Attorney for the Eastern District of North Carolina and the North Carolina Attorney's General's Office filed a civil recoupment action in federal court. The Business Court entered a stay of its proceedings pending resolution of the federal matter.

¶ 6 Until the Business Court stayed proceedings, the receiver had paid Womble's fees as an ordinary business expense without seeking permission from the court. However, on 5 March 2018, the Business Court entered an order providing that the receiver would henceforth be required to "submit bills for its outside counsel fees to the court for review on a go-forward basis." Subsequently, counsel from Womble submitted invoices for work performed for the receiver on behalf of the receivership. The court authorized the receiver to pay the invoices and clarified that "[t]he Receiver, *and not outside counsel*, should submit the request for authorization to pay outside counsel's fees and costs." (Emphasis added.)

¶ 7 In September 2018, a hurricane caused extensive damage to A Perfect Fit's storefront, ultimately causing the business to cease operations. Around that same time, some of the named defendants indicated they were close to reaching a tentative settlement with the United States Department of Justice and the State of North Carolina.

¶ 8 In July 2019, the Business Court entered an order calendaring a status conference. At the conference, the Business Court asked Mr. Mohr why the court had not received any invoices for work performed by Womble since 2018. Mr. Mohr responded that no invoices had been

submitted because the parties were engaged in settlement negotiations which, if successful, would have eventually required court approval. Mr. Mohr also noted that, pursuant to the Business Court's previous order on attorney's fees, only the receiver was authorized to submit invoices to the court. The receiver separately explained that he had misunderstood what the order on attorney's fees required and had not intentionally failed to comply with the procedure it set out. During the conference, the Business Court "expressed its frustration that by not submitting the bills from counsel and the Receiver on a timely basis, that it placed a difficult burden on the Court to suddenly have to review several months of bills all at one time."

¶ 9 After the status conference, the Business Court entered an order lifting its earlier stay of proceedings. The receiver then submitted all of Womble's outstanding invoices, totaling approximately $70,600 in fees. On 6 November 2019, the court entered an order authorizing payment of all of Womble's fees except for those arising from work performed by Mr. Mohr, finding that "the time expended by the[ ] attorneys [other than Mr. Mohr] was reasonably necessary to the Receiver to fulfill his duties." With regard to the fees incurred for work performed by Mr. Mohr, the Business Court explained that it would "decline[ ] to approve payment of the $59,355.00 in legal fees incurred because of Mohr's work" due to "the Receiver's and Mohr's flagrant disregard for the requirements imposed by the Order on Attorneys' Fees [which] warrants a significant reduction in the fees, and that reduction should be borne by Mohr." Appellants filed a timely notice of appeal.

¶ 10 On 30 January 2020, as appellants' initial appeal was pending before this Court, the receiver submitted Womble's December 2019 invoice, which included a request to pay Womble's fees for work performed on the appeal of the order refusing to authorize the payment of fees for work performed by Mr. Mohr. The Business Court subsequently entered an order approving payment of all fees incurred upon the finding that "the requested attorneys' fees and expenses were incurred for services reasonably rendered by [Womble] to the Receiver for the benefit of Perfect Fit."

¶ 11 On 27 February 2020, the receiver again submitted an invoice to the court, again including a request for authorization to pay fees for work performed by Womble on the fee-recoupment appeal. This time, the Business Court refused to authorize payment of fees incurred by Womble relating to the appeal, concluding that

> the attorneys' fees related to the Appeal were not incurred for services reasonably rendered by

> [Womble] to the Receiver for the benefit of Perfect Fit. To the contrary, the Appeal, if successful, would benefit only [Womble] and would reduce the assets of Perfect Fit. The fees incurred for this work should be borne by [Womble], and not Perfect Fit. Accordingly, the Court, in its discretion, declines to approve payment of the $5,030.50 in legal fees incurred because of work done by [Womble] on the Appeal.

The Business Court acknowledged in its order "that it previously approved the payment of a small amount of [Womble's] fees for work it performed on the Appeal" but characterized this approval as resulting from an "inadvertent oversight." Appellants filed a timely notice of appeal of this order.

¶ 12 Thereafter, on 24 March 2020, 30 April 2020, 29 May 2020, 26 June 2020, 22 July 2020, 14 September 2020, and 5 October 2020, the Business Court entered orders denying the receiver's request for authorization to pay Womble for legal services performed by its attorneys relating to the fee-recoupment appeals. The present case encompasses the appellants' consolidated appeals from both the initial order refusing to authorize the receiver to pay Mr. Mohr's fees as well as all subsequent Business Court orders denying the receiver's requests to pay fees incurred for work performed by Womble in relation to the fee-recoupment appeals.[1]

II. Legal Analysis.

A. The Business Court's decision was an abuse of discretion because it was based on a legally extraneous factual finding.

¶ 13 **[1]** When an attorney performs legal services for a receiver in connection with the receiver's administration of a receivership, the attorney may recoup "reasonable and proper compensation for . . . services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership." *Lowder v. All Star Mills, Inc.*, 309 N.C. 695, 707 (1983). Still, "those employed by a receiver to assist in the administration of a receivership should understand that their compensation is subject to trial court review and approval." *Id.* A trial court is vested with the discretionary authority to, in the first instance, "fix[ ] the compensation, if any, to be allowed for the services of an

1. On 19 October 2020, this Court allowed appellants' motion to consolidate the various appeals and ordered that any subsequent notices of appeal related to any subsequent order denying Womble's fees related to work performed on the appeals should be filed as a supplement to the record on appeal or as an appendix to the briefs.

attorney for a receiver," and a trial court's decision on this issue is accorded deference on appeal. *King v. Premo & King, Inc.*, 258 N.C. 701, 712 (1963) (quoting 75 C.J.S. *Receivers* § 384a, at 1049). "[N]evertheless[, the trial court's] discretion must be properly exercised and not abused, and the matter is discretionary only in the sense that there are no fixed rules for determining the proper amount, and not in the sense that the court is at liberty to award more [or less] than fair and reasonable compensation." *Id.*

¶ 14 Put another way, a trial court's discretion to grant or deny a receiver's request for authorization to pay fees to retained outside counsel is generally limited to (1) determining whether outside counsel rendered "services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership" and (2) determining the amount which comprises "reasonable and proper compensation for" the services outside counsel performed. *Lowder*, 309 N.C. at 707. When a trial court enters an order granting or denying a request to pay fees which contains adequate factual findings supporting its conclusions on these two questions, the trial court's determination is "prima facie correct," *King*, 258 N.C. at 712, and will not be disturbed on appeal absent a showing that the court's decision was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision," *Briley v. Farabow*, 348 N.C. 537, 547 (1998).

¶ 15 In its order denying the receiver's request to pay Mr. Mohr's fees, the Business Court did not enter findings addressing either of these two questions. The Business Court did not find that Mr. Mohr had not rendered legal services to the receiver for the benefit of the receivership. Nor did the Business Court find that it would be reasonable and proper to provide Mr. Mohr with zero compensation for any such services he may have rendered. Instead, the Business Court denied the receiver's request for authorization solely based upon what the court perceived to be the receiver's and Mr. Mohr's failure to adhere to the requirements of its prior order dictating how invoices for attorney's fees should be submitted to the court. Absent any explanation as to how this finding related to the Business Court's assessment of the legal services Mr. Mohr provided to the receiver, or to what would comprise reasonable and proper compensation for those services, this is not a permissible justification for denying a receiver's request to authorize the payment of fees to outside counsel.

¶ 16 A trial court's decision is necessarily an abuse of discretion when it reaches a conclusion based solely upon findings of fact which are

irrelevant to the legal question the court is tasked with addressing. *See Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020) ("[A]n error of law is an abuse of discretion."); *see also King*, 258 N.C. at 712 ("[An appellate court] will not alter or modify [an order authorizing or refusing to authorize payment of fees] unless *based on the wrong principle*, or clearly inadequate or excessive" (emphasis added)). In this case, by answering the question of whether Womble was entitled to recoup its fees for Mr. Mohr's work solely by reference to the receiver's and Mr. Mohr's purported failure to properly submit Womble's invoices for court approval—rather than by conducting an analysis of the legal work Mr. Mohr performed for the receiver—the Business Court's decision constituted an abuse of discretion.

B. The Business Court's order impermissibly imposed sanctions without providing notice and an opportunity to be heard to the party being sanctioned.

¶ 17 **[2]** Although the Business Court's assessment of Mr. Mohr's compliance with its prior order on attorney's fees cannot support the court's conclusion that Womble was not entitled to payment for Mr. Mohr's work, a trial court does possess the inherent authority to sanction parties and attorneys for misconduct during the course of litigation. Under appropriate circumstances, a trial court may impose sanctions, including monetary sanctions, either on motion of a party or sua sponte. *See*, *e.g.*, *State v. Defoe*, 364 N.C. 29, 34 (2010) ("[T]rial courts of this State have inherent authority to enforce procedural and administrative rules . . . ."); *see also Grubbs v. Grubbs*, No. COA16-129, 2017 WL 892564, at *14 (N.C. Ct. App. Mar. 7, 2017)) ("A judge's power to admonish counsel or parties can be either *sua sponte* or subject to a motion from a party, such as a show cause motion or Rule 11 sanctions."). Further, in certain cases, a trial court may sanction a party or attorney for failing to comply with a prior court order governing the party's or attorney's conduct during litigation. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674 (1987) (holding it to be "within the inherent power of the trial court to order plaintiff to pay defendant's reasonable costs including attorney's fees for failure to comply with a court order"); *see also Red Valve, Inc. v. Titan Valve, Inc.*, No. 18 CVS 1064, 2019 WL 4182521, at *17 (N.C. Super. Ct. Sept. 3, 2019) (ordering sanctions based upon a party's "failure to comply with the legal duties imposed by the [Business] Court's orders and applicable law, which individually and collectively reflect [the party's] utter disregard for the [court's] authority and the legal process"), *aff'd per curiam*, 376 N.C. 798, 2021-NCSC-17. Thus, we must also consider whether the Business Court's order can be sustained as an

order imposing monetary sanctions on Womble based upon Mr. Mohr's purported violation of the prior order which specified how the parties should submit Womble's invoices to the court.[2]

¶ 18 There are two legal requirements governing the trial court's entry of an order imposing sanctions against a party or attorney which are relevant in this case. First, before an order imposing sanctions against a party is entered, the party whose conduct is being sanctioned must be provided with notice of the basis upon which sanctions are being sought and an opportunity to be heard. *See Griffin v. Griffin*, 348 N.C. 278, 280 (1998) ("In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him."); *see also Egelhof ex rel. Red Hat, Inc. v. Szulik*, 193 N.C. App. 612, 616 (2008) (explaining that "North Carolina has consistently required" that the party against whom sanctions have been sought be provided "an opportunity to be heard" before an order imposing sanctions is entered). Second, the trial court's conclusion that sanctions should be imposed against a party or attorney must be "supported by its findings of fact, and . . . the findings of fact [must be] supported by a sufficiency of the evidence." *Turner v. Duke Univ.*, 325 N.C. 152, 165 (1989). In light of these two requirements, we conclude that even if we were to treat the Business Court's order as an order imposing sanctions against Womble—and even if we were to assume that the Business Court possessed the authority to withhold authorization of payments to Womble as a penalty for Mr. Mohr's conduct—the challenged order still fails to meet the applicable legal requirements.

¶ 19 First, at no time did the Business Court provide Mr. Mohr or Womble with notice that it was considering imposing sanctions based upon Mr. Mohr's purported failure to comply with a court order. Although the Business Court did "express[ ] its frustration" regarding what it viewed to be the receiver's and Mr. Mohr's tardiness in submitting fee invoices, the court did not provide notice to the parties that it was considering imposing sanctions and did not provide "notice of the bases of the

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2. Not every court order denying a receiver's request to pay outside counsel's fees is immediately appealable. However, in this case, the Business Court's order can reasonably be construed as an order imposing monetary sanctions on Womble. In addition, the Business Court's order only denied the receiver's request to pay outside counsel's fees in part—the order also granted the receiver's request to pay fees incurred by counsel for work not performed by Mr. Mohr, thus dissipating the pool of assets of the receivership from which Womble could ultimately be paid. Therefore, under these circumstances, we conclude that this Court has jurisdiction over the challenged orders pursuant to N.C.G.S. 7A-27(a)(2). *See Battery Park Bank v. W. Carolina Bank*, 126 N.C. 531 (1900).

sanctions." *Walsh v. Cornerstone Health Care, P.A.*, 265 N.C. App. 672, 678 (2019) (quoting *Egelhof v. Szulik*, 193 N.C. App. 612, 616 (2008)); *see also Griffin*, 348 N.C. at 280 ("The bases for the sanctions must be alleged."). Further, the fact that Mr. Mohr was present at a hearing where he disputed the Business Court's characterization of his conduct "without knowing in advance the sanctions which might be imposed does not show a proper notice was given." *Griffin*, 348 N.C. at 280. Allowing the Business Court's order to deprive Womble of fees its attorney earned without notice and an opportunity to be heard as a sanction for its attorney's conduct would violate Womble's due process rights as "guaranteed by the Fourteenth Amendment of the United States Constitution." *Id.* (quoting *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448 (1994)).

¶ 20 Second, the finding that Mr. Mohr "flagrant[ly] disregard[ed] . . . the requirements imposed by" the order on attorney's fees is unsupported by the record evidence. The order Mr. Mohr purportedly violated required *the receiver* to submit invoices to the court and specifically *forbade* "outside counsel" from "submit[ting] the request for authorization to pay outside counsel fees and costs." Although Mr. Mohr represented to the Business Court that he "would take the responsibility for not following up with the Receiver to make sure that the Receiver understood that he had to submit Womble's bills to the [Business] Court for approval," nothing in the record suggests that Mr. Mohr himself undertook any action which constituted a violation of the Business Court's order. Indeed, under the terms of the order he purportedly violated, Mr. Mohr was prohibited from doing precisely that which the Business Court apparently penalized him for not doing.

¶ 21 Whether construed as an order refusing to authorize the receiver to pay Womble's fees or as an order imposing sanctions on Womble for Mr. Mohr's failure to adhere to the requirements of a prior court order, the order is legally deficient. Accordingly, we reverse the order entered on 6 November 2019 and remand to the Business Court for further proceedings consistent with this opinion, including the entry of the findings and conclusions necessary to address the questions of (1) whether Mr. Mohr rendered "services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership" and (2) determining the amount which comprises "reasonable and proper compensation for" any such services Mr. Mohr performed. *Lowder*, 309 N.C. at 707.

C. The Business Court erred in denying the receiver's request to pay Womble's fees for its fee-recoupment litigation solely on the basis that authorizing payment would deplete A Perfect Fit's assets.

¶ 22 **[3]** Appellants also challenge the Business Court's orders refusing to authorize the receiver to pay fees incurred by Womble in the course of prosecuting this appeal. After the Business Court entered an order refusing to authorize the receiver to pay Womble's fees for work undertaken by Mr. Mohr, Womble and the receiver appealed. Subsequently, Womble's attorneys performed work on this appeal, which they billed to the receiver. In turn, the receiver requested authorization from the Business Court to pay Womble for this work. The first time the receiver sought authorization from the Business Court, it was granted. On every occasion thereafter, the Business Court denied authorization.

¶ 23 This Court has not previously considered whether outside counsel is entitled to compensation for work on litigation related to the fees originally incurred for legal services rendered to a receiver. However, as we have previously stated, outside counsel retained by a receiver is only entitled to "[r]easonable and proper compensation" for legal services "rendered to the receiver *for the benefit of the receivership*." *King*, 258 N.C. at 711 (emphasis added). The trial court's decision to grant or deny a fee payment request "must rest on facts showing actual benefits." *Id.* at 712 (quoting 75 C.J.S. *Receivers* § 384a, at 1049). Accordingly, a trial court's decision to grant or deny a receiver's request to pay outside counsel's fee-litigation fees requires a fact-intensive inquiry. It is not susceptible to a per se rule. We express no opinion on the propriety of authorizing payment of fee-litigation fees as a general matter. Instead, this question must be resolved in the first instance by the trial court on a case-by-case basis after an examination of the purpose and nature of the services rendered by outside counsel and their relationship to the interests of the receivership.

¶ 24 In this case, the sole factual finding supporting the Business Court's repeated denials of the receiver's requests for authorization to pay Womble's fee-litigation fees was the court's determination that these fees "were not incurred for services reasonably rendered by [Womble] to the Receiver for the benefit of Perfect Fit. To the contrary, the Appeal, if successful, would benefit only [Womble] and would reduce the assets of Perfect Fit." This finding rests on the erroneous presumption that legal services rendered in the furtherance of any outcome which would result in the diminution of a receivership's assets is necessarily contrary to the interests of the receivership.

¶ 25 As this Court has previously recognized, there may be circumstances under which an attorney's actions benefit a receivership even without contributing to an increase in the receivership's assets. *See*, *e.g.*, *In re Will of Ridge*, 302 N.C. 375, 384 (1981) (concluding that the trial court did not abuse its discretion in authorizing fee payments to outside counsel for services rendered in pursuit of an unsuccessful legal claim). Further, as sister courts have recognized in various contexts, applying a per se rule prohibiting attorneys from recouping fee-litigation fees could ultimately harm parties in need of able legal representation by reducing the pool of attorneys willing to provide vigorous representation on critically important matters. *See*, *e.g.*, *In re Estate of Trynin*, 49 Cal. 3d 868, 871 (1989) (explaining that an outright prohibition on awarding fee-litigation fees for representatives of decedents' estates would "ultimately be deleterious to [the estates] because attorneys would be reluctant to perform [necessary] services . . . if the compensation awarded for their services could be effectively diluted or dissipated by the expense of defending unjustified objections to their fee claims"); *see also In re Estate of Bockwoldt*, 814 N.W.2d 215, 223 (Iowa 2012) (declining to impose a categorical rule against authorizing fee-litigation fee payments).

¶ 26 In a case where an attorney retained by a receiver pursues litigation in an effort to recoup fees that prove to have been extravagant or unreasonable, it is doubtful the attorney will be able to demonstrate that his or her efforts were for the benefit of the receivership. However, in a case such as this one where there has been no finding that outside counsel's fees were unreasonable, the mere fact that authorizing the receiver to pay counsel's fee-litigation fees will diminish the receivership's assets does not itself establish that counsel's services were not rendered for the benefit of the receivership. Accordingly, we conclude that the Business Court's finding that payment of Womble's fee-litigation fees "would reduce the assets of Perfect Fit" is insufficient to support the conclusion that the services Womble rendered did not benefit A Perfect Fit. We remand to the Business Court for further proceedings not inconsistent with this opinion, including reconsideration of the applications for authorization to pay the fee-litigation fees under the proper legal standard.

III. Conclusion

¶ 27 When a receiver seeks authorization from a trial court to pay fees for services rendered by outside counsel, it is within the discretion of the trial court to determine what comprises "reasonable and proper compensation for . . . services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receiver-

ship." *Lowder*, 309 N.C. at 707. Nevertheless, in this case, the Business Court's decision constituted an abuse of discretion because it denied the receiver's request for authorization to pay fees to Womble for services performed by one of its attorneys based only upon the court's conclusion that the attorney failed to comply with procedural requirements imposed by a prior court order. Moreover, while a court generally possesses the authority to impose monetary sanctions on an attorney for failing to comply with a prior court order under appropriate circumstances, the Business Court could not impose sanctions against Mr. Mohr and Womble without providing them with notice of the basis for imposing sanctions and an opportunity to be heard, and not on the basis of conduct which the record demonstrates did not violate the order Mr. Mohr purportedly disregarded. In addition, the Business Court's conclusion that Womble's efforts to recoup its fees did not benefit A Perfect Fit cannot be sustained solely upon the finding that authorizing payment of the fees would diminish A Perfect Fit's assets.

¶ 28 Accordingly, we reverse the Business Court's order entered on 6 November 2019 in which the Business Court refused to authorize the receiver to pay fees for services rendered by Mr. Mohr and the Business Court's orders entered on 6 March 2020, 24 March 2020, 30 April 2020, 29 May 2020, 26 June 2020, 22 July 2020, 14 September 2020, and 5 October 2020 in which the Business Court refused to authorize the receiver to pay Womble's fee-litigation fees. We remand to the Business Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

COPELAND v. AMWARD HOMES OF N.C., INC.

[379 N.C. 14, 2021-NCSC-118]

WILLIAM EVERETT COPELAND IV AND CATHERINE ASHLEY F. COPELAND, CO-ADMINISTRATORS OF THE ESTATE OF WILLIAM EVERETT COPELAND
v.
AMWARD HOMES OF N.C., INC.; CRESCENT COMMUNITIES, LLC; AND CRESCENT HILLSBOROUGH, LLC

No. 56PA20

Filed 29 October 2021

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 269 N.C. App. 143, 837 S.E.2d 903 (2020), reversing and remanding an order of summary judgment entered on 7 May 2018 by Judge W. Osmond Smith III in Superior Court, Orange County. On 15 December 2020, the Supreme Court allowed plaintiffs' conditional petition for discretionary review. Heard in the Supreme Court on 1 September 2021.

Edwards Kirby, LLP, by William B. Bystrynski and David F. Kirby, and Holt Sherlin LLP, by C. Mark Holt and David L. Sherlin, for plaintiffs.

Cranfill Sumner LLP, by Steven A. Bader and F. Marshall Wall, for defendants Crescent Communities, LLC, and Crescent Hillsborough, LLC.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward, and Erwin Byrd for Amicus Curiae North Carolina Advocates for Justice.

Roberts & Stevens, PA, by David C. Hawisher, for Amicus Curiae North Carolina Association of Defense Attorneys.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE B.R.L.

[379 N.C. 15, 2021-NCSC-119]

IN THE MATTER OF B.R.L.

No. 460A20

Filed 29 October 2021

1. Termination of Parental Rights—grounds for termination—willful abandonment—visitation requests by parent

In a private termination of parental rights action, the trial court's findings of fact did not support its conclusion that a mother willfully abandoned her son pursuant to N.C.G.S. § 7B-1111(a)(7), where the mother's actions—by requesting visits with her son multiple times, visiting with him twice, and filing a pro se motion for review seeking increased visitation—did not demonstrate an intent to forego all parental claims to her son.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—no findings

In a private termination of parental rights action, the trial court's decision to terminate a mother's parental rights to her son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)) was not supported by any findings regarding the likelihood of repetition of neglect if the son were returned to his mother's care. The termination order was reversed and the matter remanded for further factual findings.

Justice BERGER dissenting.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 14 August 2020 by Judge Marion M. Boone in District Court, Surry County. This matter was calendared in the Supreme Court on 21 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Edward Eldred for respondent-appellant mother.

J. Clark Fischer for petitioner-appellees.

No brief filed on behalf of the Guardian ad Litem.

EARLS, Justice.

¶ 1 Respondent, the mother of minor child B.R.L. (Billy)[1], appeals from a trial court order terminating her parental rights on the grounds of neglect and willful abandonment. Because we hold the trial court erred in concluding that grounds existed to terminate respondent's parental rights based on willful abandonment, and because we hold that the trial court failed to make any findings regarding the likelihood of future neglect, we reverse the trial court's order and remand the case to allow further factfinding on the ground of neglect.

I. Factual Background

¶ 2 This is a private termination matter involving respondent and Billy's paternal grandparents, Mr. and Mrs. H. (petitioners). On 4 May 2017, the Surry County Department of Social Services (DSS) filed a petition alleging Billy was a neglected juvenile. The petition alleged that on 5 January 2017, DSS received a report that Billy was living in an injurious environment due to domestic violence, substance abuse, and improper supervision. Both Billy and his older sister had tested positive for controlled substances at birth.

¶ 3 The petition also alleged that respondent and Billy's father engaged in criminal activity and drug use while the children were present. On 18 March 2017, the parents were arrested for shoplifting, and the children were placed into a temporary safety placement by the parents. On 23 March 2017, while responding to a call of possible drug activity at a Dollar General store, law enforcement officers found marijuana and methamphetamines, along with other drug paraphernalia, in a location accessible to the children in their parents' vehicle.

¶ 4 Following a 30 March 2017 Child and Family Team Meeting, the parents entered into a Family Services Agreement to address substance abuse, domestic violence, and parenting skills. DSS alleged that, at the time of the filing of the juvenile petition in May 2017, the parents had not begun working towards achieving the goals necessary to alleviate the risk of harm to Billy.

¶ 5 On 12 June 2017, the parents were arrested in South Carolina on drug charges. Respondent was incarcerated until 14 September 2017.

¶ 6 A hearing on the juvenile petition was held on 12 October 2017. On 31 October 2017, the trial court entered an order adjudicating Billy as a neglected juvenile. In a separate dispositional order entered that same day, the court awarded physical and legal custody of Billy to petitioners. The court found that respondent had acted inconsistently with her

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

constitutionally protected status as a parent and was not fit to have custody of Billy. Respondent was granted two hours of supervised visitation once per month to be supervised by petitioners, which could be expanded at the discretion of petitioners. The court changed the permanent plan to legal custody with a relative and determined the permanent plan had been achieved, relieved DSS of further involvement in the matter, and waived further hearings.

¶ 7 On 25 April 2018, respondent was arrested for a probation violation in Surry County, North Carolina. Respondent remained incarcerated from 25 April through 4 August 2018. On 21 August 2018, respondent requested a visit alone with Billy. Petitioners agreed to meet but denied respondent's request for an unsupervised visit. Respondent visited with Billy on 22 August 2018.

¶ 8 Respondent visited with Billy again on 18 September 2018. However, she arrived one hour late to her two-hour visit. On 29 September 2018, respondent was arrested for a probation violation. Respondent admitted the violation, and her previously suspended sentence was activated. Respondent remained incarcerated until 26 March 2019.

¶ 9 On 11 June 2019, respondent filed a motion for review in the case requesting more visitation with Billy. A hearing was scheduled on the motion for 18 July 2019. On 11 July 2019, petitioners filed a motion to continue, and the matter was continued to 17 September 2019 but ultimately not held before the termination hearing.

¶ 10 Also on 11 July 2019, petitioners filed a petition to terminate respondent's parental rights alleging the grounds of neglect, willful failure to make reasonable progress to correct the conditions that led to the child's removal from the home, and willful abandonment.[2] N.C.G.S. § 7B-1111(a)(1)–(2), and (7) (2019). Following hearings on 9 December 2019 and 5 June 2020, the trial court entered an order on 14 August 2020 concluding that grounds existed to terminate respondent's parental rights based on neglect and willful abandonment. In a separate dispositional order entered the same day, the court concluded that termination of respondent's parental rights was in Billy's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Willful Abandonment

¶ 11 **[1]** We review a trial court's adjudication that grounds exist to terminate parental rights "to determine whether the findings are supported

2. Petitioners also sought to terminate the parental rights of Billy's father; however, he did not appeal and is not a party to this appeal.

by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)).

¶ 12 Our statutes are clear that before terminating parental rights on the grounds of willful abandonment, a trial court must find that the petitioner has presented clear, cogent, and convincing evidence the parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ." N.C.G.S. § 7B-1111(a)(7). While the question of willful intent is a factual one for the trial court to decide based on the evidence presented, *In re B.C.B.*, 374 N.C. 32, 35 (2020), and while the trial court's factual determination is owed deference, it remains our responsibility as the reviewing court to examine whether the evidence in the case supports the trial court's findings and whether, as a legal matter, the trial court's factual findings support its conclusions of law, *In re Montgomery*, 311 N.C. 101, 111 (1984).

¶ 13 Here, the evidence does not support the trial court's finding that respondent willfully abandoned Billy during the relevant six-month period. "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986)). "To find that a parent has willfully abandoned his or her child, the trial court must 'find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety.' " *In re A.L.L.*, 376 N.C. 99, 110 (2020) (quoting *In re E.B.*, 375 N.C. 310, 318 (2020)).[3] "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

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3. The dissent relies principally on *In re Lunsford*, 359 N.C. 382, 388 (2005), for the proposition that infrequent visits do not foreclose a finding of willful abandonment. But *Lunsford* involved an entirely different statute governing when a parent can inherit from a deceased intestate child, where the trial court made findings of fact that the parent had "sporadic contacts with his daughter *over a seventeen-year period*." *Id.* (emphasis added). In the context of this case, our Court has made clear that willful abandonment requires findings of fact demonstrating the "purposeful, deliberative and manifest willful determination" to abandon all parental responsibilities. *In re A.G.D.*, 374 N.C. 317, 319 (2020).

¶ 14 The petition to terminate respondent's parental rights in Billy was filed on 11 July 2019. Thus, the determinative six-month period is 11 January 2019 to 11 July 2019. In arguing that the trial court erred by concluding that her parental rights in Billy were subject to termination based on willful abandonment, respondent contends that the evidence and findings of fact demonstrate she exercised her legal rights during the six-month determinative period in several ways, including by taking multiple proactive steps to maintain her relationship with Billy. Therefore, she maintains that her actions were "simply inconsistent with the determination that she had a 'purposeful, deliberative and manifest willful determination' to relinquish her parental claims to Billy[.]"

¶ 15 Respondent further challenges as not supported by the evidence finding of fact 77, which states that "[t]he dates and times set forth herein [in the termination order], regarding the mother contacting Petitioners to set up a visit or requesting a picture of the child, are the only dates and times since June 9, 2017 that the mother has contacted Petitioners to set up visits or contacted Petitioners." Respondent asserts Mrs. H. herself testified that respondent asked for a visit on 8 May 2019, a date which is not reflected in the trial court's findings. We agree.

¶ 16 Mrs. H. testified at the hearing that on 8 May 2019, respondent contacted her and asked if Billy could spend the night at respondent's mother's house. Mrs. H. testified that, in response, she told respondent that all visits must be supervised by petitioners. In finding of fact 66, the trial court found only that on 8 May 2019, "Petitioner informed [respondent] that any visits with the child will be supervised by Petitioners pursuant to the amended disposition order and the mother will have to give Petitioners prior notice in order to schedule visits around their work and other responsibilities." The trial court's finding makes no mention of respondent's initial contact with petitioners that prompted Mrs. H. to inform respondent that only petitioners could supervise visits. Thus, the trial court's finding that the dates and times set forth in the termination order are the only dates on which respondent contacted petitioners requesting a visit is not supported by the evidence. Therefore, we disregard finding of fact 77. *See In re J.M.*, 373 N.C. 352, 358 (2020).

¶ 17 The unchallenged findings demonstrate that respondent was incarcerated for over half of the determinative six-month period and was released on 25 March 2019. Following her release, respondent requested visits with Billy on 27 March, 8 May, and 6 June 2019, all during the relevant six-month period. The findings also show that respondent visited with Billy on 20 June 2019. Both Mrs. H. and respondent also testified that respondent visited with Billy in May 2019 at a museum with the

maternal grandmother.[4] Additionally, respondent filed a pro se motion for review to increase her visitation with Billy one month before the termination petition was filed. The motion was calendared for hearing in July 2019 but continued on petitioners' motion to the date of the termination hearing and never heard. Respondent's filing seeking to obtain increased visitation with Billy prior to the filing of the petition for termination of her parental rights further demonstrates that she did not intend to forego all parental duties and relinquish all parental claims to Billy during the relevant period and undermines the trial court's finding and conclusion that she willfully abandoned Billy.

¶ 18 Respondent's actions do not rise to the level of willful abandonment, considering her two visits, her attempts to schedule additional visits, and her filing of a motion to increase her visitation,[5] all of which occurred during the relevant time period before the petition for termination was filed. *See, e.g.*, *In re D.T.L.*, 219 N.C. App. 219, 222 (2012) (stating that the respondent-father's filing of a civil custody action "cannot support a conclusion that he had a willful determination to forego all parental duties and relinquish all parental claims to the juveniles"); *see also Bost v. Van Nortwic*k, 117 N.C. App. 1, 19 (1994) (finding no willful abandonment where the parent visited the children at Christmas, attended three soccer games, and indicated that he wanted to arrange support payments for the children and regular visitation), *appeal*

4. The dissent's argument that this Court acts improperly when it reviews evidence in the record is misplaced. In conducting the requisite analysis on appeal to determine whether a trial court's findings of fact are supported by clear, cogent, and convincing evidence, we necessarily examine the evidence in the record produced in the underlying proceedings. *See, e.g.*, *In re D.W.P.*, 373 N.C. 327, 328 (2020) (affirming order terminating respondent's parental rights "[a]fter careful consideration of . . . the record evidence[.]"); *In re M.S.E.*, 2021-NCSC-76, ¶ 13 (affirming order terminating respondent's parental rights "[a]fter careful review of the record[.]"); *In re A.M.L.*, 2021-NCSC-21, ¶ 18 (affirming trial court finding because "[t]he record supports this determination."). Further, while we agree with the dissent generally that "[f]indings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings," *In re N.B.*, 195 N.C. App. 113, 116 (2009), we are not bound to defer to factual findings that are unsupported by the record. *See, e.g.*, *In re S.M.*, 375 N.C. 673, 684 (2020) (disregarding findings of fact that are unsupported by clear, cogent, and convincing evidence).

5. We do not suggest that filing a motion to increase visitation, standing alone, necessarily defeats the assertion that a parent has willfully abandoned his or her child within the meaning of N.C.G.S. § 7B-1111(a)(7). We do hold that it is evidence to be considered in the willful abandonment analysis, especially given that a parent's failure to file such a motion is routinely found to be evidence supporting a finding that the willful abandonment ground has been proven. *See, e.g.*, *In re E.H.P.*, 372 N.C. 388, 394 (2019) (holding that father's failure to seek to modify temporary custody judgment is evidence of willful abandonment)*; In re A.L.S.*, 374 N.C. 515, 522 (2020) (holding that mother's failure to seek to modify a custody order is evidence of willful abandonment).

dismissed, 340 N.C. 109 (1995). Accordingly, we hold that the trial court's findings of fact do not support its conclusion that respondent's parental rights were subject to termination based on willful abandonment.

III. Neglect

¶ 19 **[2]** Respondent next argues that the trial court erred in concluding grounds existed to terminate her parental rights based on neglect. Respondent contends the trial court failed to make a finding regarding the likelihood of future neglect and that the evidence would not support such a finding had one been made.

¶ 20 A trial court may terminate parental rights when it concludes that the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019). In some circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See*, *e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) ("[T]his Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment."). However, in other instances, the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. at 80. In this situation, "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984).

¶ 21 After weighing this evidence, the court may find the neglect ground if it concludes the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 375 N.C. 838, 841 (2020). Thus, even in the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent. *Id.* at 841, n.3. In doing so, the trial court must consider evidence of changed circumstances that

may have occurred between the period of prior neglect and the time of the termination hearing. *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *Ballard*, 311 N.C. at 715).

¶ 22 In this case, respondent does not dispute that there was a finding of prior neglect. She contends, however, that the trial court order does not establish that it "recognized its duty to assess the likelihood of 'future neglect.' " Respondent argues that the trial court failed to make any determination of future neglect and that the court found and concluded only that respondent "ha[s] neglected the child[.]"

¶ 23 We agree that the trial court's adjudication order is devoid of any determination of a likelihood of future neglect should Billy be returned to respondent's care. Indeed, the trial court made very few findings of fact directly related to respondent's ability to care for Billy at the time of the termination hearing or regarding any change in respondent's circumstances since the initial neglect adjudication. The only factual finding that directly addresses respondent's current circumstances and her ability to care for Billy is finding of fact 88, in which the court found that respondent was not physically disabled but was unemployed, did not have a driver's license, did not have a vehicle, and did not have stable housing. Although the trial court found that Billy was previously adjudicated neglected, the court did not make any finding regarding the likelihood that Billy would be neglected if he was returned to respondent's care, a finding which was necessary to sustain the conclusion that respondent's parental rights were subject to termination based on neglect. *See In re K.C.T.*, 375 N.C. at 599 (stating that "the trial court's order lacks any findings whatsoever that address the possibility of repetition of neglect").

¶ 24 Thus, we hold that the trial court's findings are insufficient to support the termination of respondent's parental rights on the ground of neglect.[6] *See In re C.L.H.*, 2021-NCSC-1, ¶10 (holding that the trial court erred in concluding the neglect ground existed where the trial court did not find that there would be a likelihood of future neglect and the findings of fact did not support such a conclusion). However, there may be evidence in the record from which the trial court could have made additional findings of fact that might have been sufficient to support a finding of a likelihood of future neglect. We therefore reverse the trial court's order but

6. For the same reasons discussed above that grounds did not exist to terminate parental rights based on willful abandonment, the findings do not support a conclusion of neglect by abandonment.

remand the matter allowing for further factual findings on this ground. *See In re K.N.*, 373 N.C. 274, 284 (2020); *In re N.D.A.*, 373 N.C. at 84.

IV. Conclusion

¶ 25 In summary, we reverse the trial court's order terminating parental rights but remand the case for further proceedings not inconsistent with this opinion, including, if appropriate, the entry of a new order containing proper findings of fact and conclusions of law addressing whether grounds exist pursuant to N.C.G.S. § 7B-1111(a)(1) to support the termination of respondent's parental rights in Billy. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so.

REVERSED AND REMANDED.

Justice BERGER dissenting.

¶ 26 The trial court's order does not contain findings related to the likelihood of future neglect, and I concur in the result reached by the majority as to that ground. However, "a finding of only one ground is necessary to support [ ] termination of parental rights." *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019). Because the trial court's findings of fact and conclusions of law support termination of respondent's parental rights on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7), I respectfully dissent.

¶ 27 The question before this Court is not what findings of fact could have been included in the trial court's order terminating respondent's parental rights. Rather, the appropriate question is whether the findings of fact set forth in the trial court's order support its conclusions of law. Here, they most certainly do.

¶ 28 A trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C.G.S. § 7B-1111(a)(7) (2019). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997). This Court has held that a "parent relinquishes all parental claims and abandons the child" when that parent "withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

"Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 752 (2020).

¶ 29 The majority concedes that the question of willful intent "is a factual one for the trial court to decide based on the evidence presented" and that "a trial court's factual determination is owed deference[.]" Indeed, the weighing of evidence and the determination of what facts to find are based upon the unique insight of the trial court and should be given deference upon review. As this Court has stated, a trial court's "observation[s] of [] parties and [] witnesses provide[s] him with an opportunity to evaluate the situation that cannot be revealed on printed page." *In re Montgomery*, 311 N.C. 101, 112 (1984).

¶ 30 It is rudimentary that this Court is limited to determining whether a trial court's "*findings* support the conclusion of law." *In re G.B.*, 377 N.C. 106, 2021-NCSC-34, ¶ 11 (emphasis added). The majority here inappropriately "goes beyond this task and supplements the trial court's order with new factual findings." *Id.*, ¶ 37 (Earls, J., dissenting). In doing so, the majority here usurps this duty from the trial court and operates as its own fact finder.

¶ 31 The trial court heard testimony and assigned weight to the evidence. The trial judge then made detailed findings of fact related to the evidence presented. The majority's focus on the difference between two and three visitation requests by respondent ignores the reality that willful abandonment still exists here given the remaining findings of fact and conclusions of law set forth in the trial court's order.

¶ 32 The majority correctly notes that the relevant six-month period here is January 11, 2019, to July 11, 2019. However, the majority focuses solely on the latter portion of this period in its analysis. Despite the trial court finding as fact that respondent was incarcerated between January 2019 and March 2019, the majority fails to discuss respondent's actions, or lack thereof, during this time. The trial court determined from the evidence that respondent made no attempt to communicate with Billy while she was incarcerated, nor did she inquire about Billy's well-being. Instead, respondent's only effort to be a parent to Billy while she was incarcerated was prior to the determinative period when she sent Billy a book two weeks after his birthday in November 2018.

¶ 33 Our precedent is clear that respondent's incarceration does not absolve her of the parental duty she owed to Billy. *See In re L.M.M.*, 375 N.C. 346, 351, 847 S.E.2d 770, 775 (2020) (a "parent will not be excused from showing interest in [the] child's welfare by whatever means avail-

able," even if their "options for showing affection while incarcerated are greatly limited.") (emphasis omitted). The majority nonetheless overlooks respondent's failure to pursue any parental involvement with Billy during that time without explanation.

¶ 34 Moreover, respondent repeatedly failed to communicate with petitioners regarding visitations. Indeed, the trial court found that respondent only visited Billy once during the determinative period, and that was after she attempted to cancel that particular visitation. Respondent's absence from the juvenile's life was such that petitioner testified that Billy "[did not] know who [respondent was]."

¶ 35 Sporadic visitation requests and less frequent visits should not foreclose a finding of willful abandonment. Discussion on this point is noticeably absent from the majority opinion. This Court has held that neither continuous absence nor complete disregard for the child is required for willful abandonment. *In re Lunsford*, 359 N.C. 382, 390–91, 610 S.E.2d 366, 372 (2005) (affirming trial courts finding that only sporadic contacts between a parent and minor child over the child's life was sufficient to constitute willful abandonment.). Indeed, because "a child's physical and emotional needs are constant," a parent's responsibilities "cannot be discharged on an ad hoc, intermittent basis." *Id.*; *see also Pratt*, 257 N.C. at 503 (rejecting the respondent-father's contention that one visit during the determinative six-month period refuted a finding of willful abandonment.).

¶ 36 The majority concludes that "respondent's actions do not rise to the level of willful abandonment, considering her two visits, her attempts to schedule additional visits, and her filing of a motion to increase her visitation, all of which occurred during the relevant time period before the petition termination was filed." In support, the majority cites *In re D.T.L.* for the proposition that filing a civil custody action "cannot support a conclusion [of] a willful determination to forego all parental duties and relinquish all parental claims."[1] *In re D.T.L.*, 219 N.C. App. 219, 222, 722 S.E.2d 516, 518 (2012). However, the respondent-father in *D.T.L.* was prohibited by court order from seeing the minor children, markedly different than the situation before us. *Id.* The trial court's findings here indicate that no court order prevented respondent from participating more fully in her son's life; respondent alone did that. *See Lunsford*, 359

1. The majority also offers for support on this point *In re E.H.P.*, 372 N.C. 388, 394 (2019) and *In re A.L.S.*, 374 N.C. 515, 522 (2020). Similarly, these cases involve respondent-parents who were prohibited from visitation by court orders and are distinguishable from the situation before us.

N.C. at 388, 610 S.E.2d at 370 (finding that the "major factors" preventing respondent-father from involvement in child's life were respondent's own "alcoholism and immaturity.").

¶ 37 No prior holdings of our appellate courts establish that the filing of a motion will negate a finding of willful abandonment. Yet the majority's mischaracterization of *D.T.L.* here may open that issue up to argument. Language in our precedent certainly does not support the position that an abandoning parent can avoid termination simply by taking the administrative step of filing a motion with our courts. *See Pratt*, 257 N.C. at 502, 126 S.E.2d at 609 (finding that abandonment is not merely an "ambulatory thing the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child.").

¶ 38 Additionally, and again without mention or discussion by the majority, Billy had significant medical issues. Respondent neither attended, nor attempted to attend, any of Billy's medical appointments. Moreover, she failed to provide financial support for care-related costs over the course of almost two years. In fact, respondent failed to pay any child support at all. One is hard-pressed to imagine a more obvious example of a parent's refusal to "lend support and maintenance." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608 (1962). Despite the parties each dedicating four pages of their briefs to this topic, the majority does not offer a single sentence on this point.

¶ 39 In this case, the trial court heard the evidence presented at the hearing to terminate respondent's parental rights. The trial court made findings of fact based upon that evidence, and those findings of fact support the conclusion that termination of respondent's parental rights was appropriate. I would affirm the termination of respondent's parental rights on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

IN RE O.E.M.

[379 N.C. 27, 2021-NCSC-120]

IN THE MATTER OF O.E.M.

No. 471A20

Filed 29 October 2021

Termination of Parental Rights—motion in the cause—verification requirement—N.C.G.S. § 7B-1104—subject matter jurisdiction

The trial court lacked subject matter jurisdiction to terminate a father's parental rights to his son based on an unverified motion in the cause, which was filed pursuant to N.C.G.S. § 7B-1102 after the child was adjudicated dependent and neglected, because the requirement in N.C.G.S. § 7B-1104 that a petition or motion to terminate parental rights "shall be verified" was jurisdictional in nature—a result compelled by *In re T.R.P.*, 360 N.C. 588 (2006), which interpreted the same language in N.C.G.S. § 7B-403(a) to be jurisdictional. Nothing in section 7B-1104 distinguished between a petition and a motion in the cause, the statutory requirements served important constitutional interests, and a trial court could not derive its jurisdiction in a termination matter from a prior abuse, neglect, or dependency proceeding.

Justice BARRINGER dissenting.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order terminating respondent-father's parental rights entered on 21 August 2020 by Judge Kimberly Gasperson-Justice in District Court, Transylvania County. Heard in the Supreme Court on 30 August 2021.

No brief filed for petitioner-appellee Transylvania County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Rebecca C. Fleishman and Beth Tyner Jones, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

EARLS, Justice.

¶ 1 In this case, we decide whether the trial court had jurisdiction to enter an order terminating respondent-father's parental rights in his child, O.E.M. (Oscar).[1] The party seeking termination, the Transylvania County Department of Social Services (DSS), failed to verify its motion in the cause for termination as required under N.C.G.S. § 7B-1104 (2019). Nevertheless, after conducting a hearing, the trial court terminated respondent-father's parental rights.

¶ 2 The precise question before us is whether DSS' failure to verify its motion deprived the trial court of subject matter jurisdiction to conduct termination proceedings. In *In re T.R.P.*, this Court held that a party's failure to verify a petition alleging that a juvenile was neglected was a fatal jurisdictional defect. 360 N.C. 588, 588 (2006). Although *In re T.R.P.* addressed a party's failure to verify a juvenile petition, we hold today that the requirement contained in subsection 7B-1104 is also jurisdictional as applied to a motion in the cause for termination. Accordingly, we conclude that DSS' failure to verify its motion in the cause deprived the trial court of subject matter jurisdiction, and we vacate the order terminating respondent-father's parental rights in Oscar.

I. Analysis

¶ 3 DSS filed a properly verified juvenile petition alleging that Oscar was a neglected and dependent juvenile on 27 November 2018. The petition alleged that Oscar's mother[2] lacked "knowledge of normal child development" and had exhibited "delusional" behavior at the hospital after giving birth, and that respondent-father lacked "essential items for the juvenile" in his residence and had a pending criminal charge for assault on a female. Both parents admitted to frequent marijuana usage. The trial court entered an order granting DSS nonsecure custody of Oscar and, after a hearing, an order adjudicating Oscar to be a dependent and neglected juvenile. Both parents entered into case plans with DSS. Respondent-father complied with some elements of his case plan and did participate in occasional visits with Oscar, but he continued to use marijuana and engaged in further acts of domestic violence.

¶ 4 On 25 March 2020, DSS filed a motion in the cause seeking termination of both parents' parental rights on the grounds of neglect pursuant

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1. Oscar is a pseudonym which is used for ease of reading and to protect the identity of the juvenile.

2. Oscar's mother, who was ultimately deemed incompetent and provided with an appointed guardian ad litem to represent her at the termination hearing, did not appeal the order terminating her parental rights.

to N.C.G.S. § 7B-1111(a)(1), willful failure to make reasonable progress in correcting the conditions leading to Oscar's removal pursuant to N.C.G.S. § 7B-1111(a)(2), and incapability pursuant to N.C.G.S. § 7B-1111(a)(6). DSS failed to verify this motion.[3] On 3 June 2020, the trial court conducted a termination hearing. On 21 June 2020, the trial court entered an order concluding that DSS had proven all three grounds and terminating both parents' rights in Oscar.

¶ 5 On appeal, respondent-father does not challenge the findings of fact or conclusions of law contained in the termination order. Rather, the sole basis for respondent-father's appeal is DSS' failure to verify its motion for termination. It is undisputed that DSS did not verify its motion as required under N.C.G.S. § 7B-1104. The parties disagree as to what consequences arise from this omission. Because the parties' dispute centers on their competing interpretations of our holding in *In re T.R.P.*, we begin with a brief examination of our decision in that case.

A. In *In re T.R.P.*, this Court established that a statutory mandate to verify a juvenile petition before filing creates a jurisdictional requirement.

¶ 6 To initiate the process for terminating a parent's parental rights in a juvenile, the party seeking termination must file a petition or may, if the child is already the subject of a pending abuse, neglect, or dependency proceeding, file a motion in the cause for termination. N.C.G.S. § 7B-1104 (2019). Subsection 7B-1104 provides that "[t]he petition [for termination], or motion pursuant to [N.C.G.S. §] 7B-1102, *shall be verified* by the petitioner or movant." *Id.* (emphasis added). The significance of the phrase "shall be verified" is the sole issue before us in this case.

¶ 7 In *In re T.R.P.*, we examined an analogous statutory provision requiring that a petition alleging a juvenile to be abused, neglected, or dependent "shall be . . . verified before an official authorized to administer oaths." 360 N.C. at 591 (quoting N.C.G.S. § 7B-403(a) (2005)). In that case, the Wilkes County Department of Social Services (WCDSS) filed a

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3. We acknowledge that the motion was filed at the start of the COVID-19 pandemic and shortly after emergency orders establishing modified court procedures were entered. *See e.g.*, Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020), https://www.nccourts.gov/covid-19 (encouraging judges to grant additional accommodations to parties, witnesses, attorneys, and others with business before the courts who are at a high risk of severe illness from COVID-19."); *see also* Order of the Chief Justice Extending Court System Deadlines (19 March 2020), https://www.nccourts.gov/covid-19. However, there is nothing in the record to suggest that DSS' failure to verify its motion in the cause was in any way related to difficulties caused by the pandemic or any related accommodations, and counsel has made no argument or representation to that effect before this Court.

juvenile petition alleging that a juvenile was neglected, but the petition "was neither signed nor verified by the Director of WCDSS or any authorized representative thereof." *Id.* at 589. After the trial court entered an order granting legal custody of the juvenile to WCDSS and physical custody to the juvenile's father, the respondent-mother appealed, contending that "the trial court lacked jurisdiction to enter the challenged review order because the juvenile petition was not verified as required by law." *Id.* The Court of Appeals agreed with respondent-mother and vacated the custody order for lack of subject matter jurisdiction. *In re T.R.P.*, 173 N.C. App. 541 (2005). In a 4-3 decision, this Court affirmed the decision of the Court of Appeals.

¶ 8 The majority began by describing the General Assembly's expansive authority to "within constitutional limitations, [ ] fix and circumscribe the jurisdiction of the courts of this State." *In re T.R.P.*, 360 N.C. at 590 (quoting *Bullington v. Angel*, 220 N.C. 18, 20 (1941)). According to the majority, when the legislature requires a party "follow a certain procedure" to invoke the trial court's subject matter jurisdiction, a trial court lacks authority to act if the party fails to follow that procedure. *Id.* (quoting *Eudy v. Eudy*, 288 N.C. 71, 75 (1975)). Thus, the majority recognized the general rule that "for certain causes of action created by statute, the requirement that pleadings be signed and verified 'is not a matter of form, but substance, and a defect therein is jurisdictional.' " *Id.* (quoting *Martin v. Martin*, 130 N.C. 27, 28 (1902)). The majority found ample reason to extend this general rule to causes of action created by North Carolina's juvenile code.

¶ 9 According to the majority, "verification of a juvenile petition is no mere ministerial or procedural act." *Id.* at 591. Instead, the majority reasoned that in a proceeding which "frequently results in DSS' immediate interference with a respondent's constitutionally-protected right to parent his or her children," *id.* at 591–92, the verification requirement serves as a "vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other," *id.* at 591. The majority emphasized "[t]he gravity of a decision to proceed and the potential consequences of filing a petition" alleging that a juvenile is abused, neglected, or dependent. *Id.* at 592. In light of

> the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an

> identifiable government actor "vouches" for the validity of the allegations in such a freighted action.

Id. In addition, the majority noted that "for more than twenty years our Court of Appeals has consistently held that subject matter jurisdiction over juvenile actions is contingent upon verification of the petition," and that the General Assembly had never amended the relevant provisions of the juvenile code to modify or abrogate this holding. *Id.* at 594.

B. The verification requirement is jurisdictional with regard to both petitions and motions in the cause filed pursuant to N.C.G.S. § 7B-1102.

¶ 10 Although *In re T.R.P.* did not directly address the statute or circumstances at issue in this case, both parties agree *In re T.R.P.* is relevant. According to respondent-father, the exact same reasons which compelled this Court to hold that the verification requirement contained in N.C.G.S. § 7B-403(a) was jurisdictional should compel us to hold that the verification requirement contained in N.C.G.S. § 7B-1104—which mirrors subsection 7B-403(a) in providing that a petition or motion "shall be verified"—is also jurisdictional. The appellee, Oscar's guardian ad litem (GAL), acknowledges that under *In re T.R.P.*, the verification requirement contained in N.C.G.S. § 7B-1102 is jurisdictional with regards to a *petition* for termination of parental rights. Nonetheless, the GAL contends that *In re T.R.P.* does not control when, as in this case, the party seeking termination initiates termination proceedings with the filing of a *motion in the cause*. In this circumstance, the GAL argues, and the dissent agrees, that the verification requirement should be treated as a merely "procedural" requirement and that DSS' failure to verify its motion does not dispossess the trial court of the jurisdiction it obtained when DSS filed a properly verified petition to have Oscar adjudicated neglected and dependent. We reject this argument for three reasons.

1. The statutory text of N.C.G.S. § 7B-1104 does not support drawing any distinction between petitions and motions in the cause regarding application of the verification requirement.

¶ 11 The first problem with the GAL's argument is that it is entirely inconsistent with the text of N.C.G.S. § 7B-1104. "The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889 (2018). "When the meaning is clear from the statute's plain language, we 'give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.' " *In re J.E.B.*, 376 N.C. 629, 2021-NCSC-2, ¶ 11

(quoting *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730 (2020)). Because "[t]he intent of the General Assembly may be found first from the plain language of the statute," *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001), we typically "begin[ ] with an examination of the plain words of the statute," *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992).

¶ 12 In *In re T.R.P.*, we concluded that the phrase "shall be verified" supplied "unambiguous statutory language [which] mandates our holding" that the General Assembly intended the verification requirement to be jurisdictional. 360 N.C. at 594. The GAL does not ask us to overrule *In re T.R.P.*, and we see no cause to disturb a well-reasoned opinion which itself reaffirmed a longstanding legal principle. Thus, we are "bound by prior precedent[under] the doctrine of stare decisis." *Bacon v. Lee*, 353 N.C. 696, 712 (2001). Under *In re T.R.P.*, the phrase "shall be verified" as used in the various provisions of our juvenile code imposes a jurisdictional requirement. Therefore, the argument that the verification requirement is jurisdictional when applied to a "petition" but procedural when applied to a "motion pursuant to [N.C.G.S. §] 7B-1102" is irreconcilable with the text of N.C.G.S. § 7B-1104, unless *In re T.R.P.* is to be overruled.

¶ 13 The plain words of N.C.G.S. § 7B-1104 make clear that the General Assembly did not intend for the verification requirement to operate differently for a petition for termination as compared to a motion in the cause. The qualifier "shall be verified" modifies both "[t]he petition" and "motion pursuant to [N.C.G.S. §] 7B-1102" in the same way without drawing any distinction between the two. The phrase "shall be verified" does not mean one thing when it modifies "[t]he petition" and another when it modifies "motion." The General Assembly knows how to attach distinct legal consequences to different acts or omissions described in a single statute. *See, e.g.*, N.C.G.S. § 1A-1, Rule 41 (2019) (providing for different consequences when a claim is dismissed without prejudice by stipulation, dismissed without prejudice by the court, or dismissed involuntarily upon motion of the defendant). In this case, the General Assembly chose not to make any distinction.

¶ 14 The dissent advances various policy arguments in support of its contention that it is inappropriate to treat the words "shall be verified" as jurisdictional in this context. Notwithstanding the substance of those arguments, the dissent makes no effort to reconcile them with the text and structure of N.C.G.S. § 7B-1104 and the binding precedent we established in *In re T.R.P.* Absent any indication that the legislature intended the phrase "shall be verified" to have one meaning in one place

and an entirely different meaning in another place—and as long as *In re T.R.P.* remains good law—we are bound to give effect to the words the legislature chose to deploy. This Court is not at liberty to treat the verification requirement as jurisdictional in one context and procedural in another. Doing so would require us to "read into a statute language that simply is not there." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 2021-NCSC-83, ¶ 22 (cleaned up).

2. Treating the verification requirement as jurisdictional in the context of a motion in the cause serves important constitutional interests.

¶ 15 The second problem with the GAL's argument is that it ignores the concerns which underpinned our holding in *In re T.R.P.* and which are no less present when a party initiates a termination proceeding via a motion in the cause. According to the GAL, it is appropriate to treat the verification requirement as jurisdictional when a termination petition is filed because, in that circumstance, the verification requirement "assur[es] that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action." However, the GAL contends that treating the verification requirement as jurisdictional is redundant when a motion for termination is filed regarding a child already subject to an abuse, neglect, or dependency proceeding because in this circumstance the movant "ha[s] already vouched for the validity of the allegations underlying the TPR motion."

¶ 16 As we recognized in *In re T.R.P.*, the legislature's choice to require a party to verify its filing before beginning a juvenile proceeding "is a minimally burdensome limitation on government action, designed to ensure that a [DSS] intervention that has the potential to disrupt family bonds is based upon valid and substantive allegations before the court's jurisdiction is invoked." 360 N.C. at 598. The same holds true for a termination proceeding regardless of the manner in which the proceeding begins.[4]

¶ 17 The allegations underlying a juvenile abuse, neglect, or dependency petition may overlap with, but are necessarily not the same as, the allegations underlying a motion for termination regarding the same juvenile.

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4. The dissent acknowledges that *In re T.R.P.* establishes that a failure to verify "pleadings and petitions *commencing* an action and their amendments thereto" is a jurisdictional defect, but suggests that a motion in the cause does something different. Yet, in this context, a motion in the cause for termination serves the exact same function as a petition for termination: It is what a party files in order to "commenc[e]" a termination proceeding, which is separate and distinct from an underlying juvenile proceeding.

A trial court's decision to terminate a parent's parental rights depends upon evidence of the parent's conduct subsequent to an initial adjudication of the juvenile as abused, neglected, or dependent. *See In re Ballard*, 311 N.C. 708, 716 (1984) ("The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists *at the time of the termination proceeding*.") (emphasis added); *see also In re B.O.A.*, 372 N.C. 372, 385 (2019) ("[T]he extent to which a parent has *reasonably complied with [a] case plan provision* is, at minimum, relevant to the determination of whether that parent's parental rights in his or her child are subject to termination for failure to make reasonable progress.") (emphasis added).

¶ 18 For example, in this case, DSS' motion to terminate respondent-father's parental rights included new allegations that he had "made minimal efforts to complete his case plan," "failed to demonstrate benefit from services directed toward remediating the issues that led to the child being placed out of [his] home," "fail[ed] . . . to make regular inquiry with regard to the minor child and aggressively work toward reunification," and failed to "show[ ] the ability to refrain from the use of controlled substances and he is unlikely to quit the use of said substances even with substance abuse treatment and medications." None of this was known at the time the original juvenile petition was verified. The trial court could not have determined that grounds existed to terminate respondent-father's parental rights without entering findings of fact addressing these allegations. It is in no way redundant to require DSS to verify a new motion containing new allegations regarding a parent's conduct which could not possibly have been included in an initial abuse, neglect, or dependency petition.

¶ 19 Further, the stakes for a parent are considerably higher in a termination proceeding than in an abuse, neglect, or dependency proceeding. Although the latter carries with it "the potential to disrupt family bonds," *In re T.R.P.*, 360 N.C. at 598, the former may result in the permanent severance of the parent-child relationship and the extinguishment of an individual's constitutional status as a parent. Of course, the "paramount importance of the child's best interest and the need to place children in safe, permanent homes within a reasonable time" weigh heavily throughout every phase of a juvenile proceeding. *Id.* at 601 (quoting *In re R.T.W.*, 359 N.C. 539, 549–50 (2005)). Yet our juvenile code also incorporates the protections afforded to all parents under the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *In re E.B.*, 375 N.C. 310, 316 (2020).[5]

5. N.C.G.S. § 7B-1100(2) provides that one purpose of Article 11 is "to protect all juveniles from *the unnecessary severance of a relationship with biological or legal*

The General Assembly chose to mandate that DSS verify the allegations underpinning an action seeking to interfere with the parent-child relationship. This choice helps ensure that the State appropriately balances its interest in expeditiously achieving permanency for at-risk juveniles with its interest in not improperly abrogating North Carolinians' constitutionally guaranteed parental rights and not subjecting juveniles to the disruption occasioned by a termination proceeding except when necessary. These concerns are present regardless of whether DSS has filed a petition for termination or a motion in the cause.

3. A trial court's jurisdiction to conduct an abuse, neglect, or dependency proceeding does not automatically extend to a termination proceeding.

¶ 20 Finally, we reject the GAL's argument that DSS' filing of a properly verified petition alleging Oscar was neglected and dependent vests the trial court with jurisdiction to terminate respondent-father's parental rights. According to the GAL, we need not treat the verification requirement as jurisdictional when DSS files a motion for termination after previously filing a properly verified juvenile petition, because the trial court need not "re-establish" the jurisdiction it possessed over the underlying juvenile proceedings. This argument is inconsistent with our precedents and with the jurisdictional provisions of the juvenile code.

¶ 21 A petitioner or movant must satisfy distinct requirements to vest a trial court with jurisdiction to conduct a juvenile proceeding on the one hand and a termination proceeding on the other. *Compare* N.C.G.S. § 7B-200(b) (listing certain jurisdictional requirements for abuse, neglect, and dependency proceedings) *with* N.C.G.S. § 7B-1101 (listing certain jurisdictional requirements for termination proceedings).[6] A trial court's authority to adjudicate a child abused, neglected, or dependent does not confer upon the court the authority to terminate that child's parents' parental rights. *See In re A.L.L.*, 376 N.C. 99, 105 (2020) ("[A]

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parents." (Emphasis added.) The General Assembly did not intend for—and the constitution does not allow—courts to disregard the procedural protections afforded to biological and legal parents, which protect both the parents' constitutional parental rights and juveniles from "unnecessary severance" of the parent-child relationship.

6. In addition, there is a difference between the requirements for establishing the jurisdiction of a court to act as a general matter and the requirements for establishing that a court may exercise its jurisdiction in a particular case. Thus, as *In re T.R.P.* recognized, even if a trial court is generally a proper forum for adjudicating the status of a child because the requirements of N.C.G.S. § 7B-200(b) or N.C.G.S. § 7B-1101 have been met, a particular court may lack jurisdiction over a particular child because other jurisdictional prerequisites have not yet been satisfied.

trial court lacks jurisdiction over a termination petition if the requirements of N.C.G.S. § 7B-1101 have not been met, even if there is an underlying abuse, neglect, or dependency action concerning that juvenile in the district in which the termination petition has been filed."). If a petitioner or movant fails to meet all of the requirements for establishing the court's jurisdiction over a termination proceeding, then the court lacks jurisdiction to conduct a termination proceeding, regardless of whether the trial court previously exercised jurisdiction over the child for other purposes.

¶ 22 The GAL's reliance on a recent decision from this Court in support of its argument on this issue is misplaced. In its brief, the GAL points to language from our decision in *In re K.S.D-F.*, where we stated that "[j]urisdiction arises upon the filing of 'a properly verified juvenile petition' and extends 'through all subsequent stages of the action.' " 375 N.C. 626, 633 (2020) (quoting *In re T.R.P.*, 360 N.C. at 593). The GAL contends that *In re K.S.D-F.* means that once a trial court obtains jurisdiction over a juvenile through the filing of a properly verified juvenile petition, the trial court's jurisdiction continues up through and including a termination proceeding. However, the GAL's interpretation of this language misconstrues both *In re K.S.D-F.* and the provisions of the juvenile code we addressed in that case.

¶ 23 In *In re K.S.D-F.*, the respondent-mother asserted that the trial court lacked jurisdiction to terminate her parental rights because DSS did not lawfully have custody of the children at the time it filed its motion for termination. *Id.* at 632. If the respondent-mother's assertion was correct, DSS would have lacked standing to file a termination motion under N.C.G.S. § 7B-1103(a)(3) (2019), and the trial court would have lacked jurisdiction to conduct termination proceedings. *Id.* According to the respondent-mother, when the trial court had, in an earlier proceeding, "determined that a permanent plan for custody and guardianship with [foster parents] was in the children's best interests and awarded custody and guardianship to the [foster parents]," the trial court's jurisdiction over the children ceased. *Id.* at 633. Thus, the respondent-mother claimed that the trial court lacked the legal authority to enter a subsequent order placing the children back in DSS custody and by extension that DSS lacked standing to file a termination motion.

¶ 24 We rejected the respondent-mother's argument, noting that when the trial court entered an order placing the children with foster parents, "[t]he trial court specifically retained jurisdiction and provided that further hearings could be brought upon a motion by any party." *Id.* Therefore, when DSS subsequently filed a motion to reopen proceed-

ings, the trial court did possess the authority to place the children in DSS custody. *Id.* at 633–34. Because the trial court did have jurisdiction to enter the nonsecure custody order, DSS legally had custody of the juveniles, such that DSS "had standing to file the motion to terminate respondents' parental rights" which vested "the trial court [with] jurisdiction over the termination action." *Id.* at 635.

¶ 25 Nothing in *In re K.S.D-F.* suggested that the trial court's jurisdiction over an underlying abuse, neglect, or dependency proceeding was sufficient, standing alone, to establish the court's jurisdiction over a subsequent termination proceeding. Indeed, our reasoning in *In re K.S.D-F.* is predicated on the assumption that jurisdiction does not continue from the underlying juvenile proceeding to a subsequent termination proceeding. If the GAL's theory is correct, there would have been no reason for this Court to reach the question of whether DSS had standing to file a motion to terminate the respondent-mother's parental rights in *In re K.S.D-F.* because the trial court indisputably had jurisdiction to conduct the underlying juvenile proceedings after DSS filed a properly verified petition alleging the juvenile was neglected. We would have had no reason to decide whether there existed an independent basis for the trial court's authority to enter an order terminating the respondent-mother's parental rights.

¶ 26 There is nothing anomalous about requiring a party to establish that the trial court possessed jurisdiction to conduct a termination proceeding even when the court previously had jurisdiction to conduct a juvenile proceeding—it is simply what our juvenile code requires. *See, e.g.*, *In re J.M.*, 797 S.E.2d 305, 307 (N.C. Ct. App. 2016) (holding that the Durham County District Court "lacked jurisdiction to hear the termination of parental rights petition" even though the court previously exercised jurisdiction in an underlying juvenile proceeding, because "none of the[independent jurisdictional] requirements were met"). Accordingly, we reject the GAL's argument that the trial court in this case possessed subject matter jurisdiction to terminate respondent-father's parental rights in Oscar notwithstanding DSS' failure to verify its motion for termination.

II. Conclusion

¶ 27 In all significant respects, this case is indistinguishable from our decision in *In re T.R.P.* As in *In re T.R.P.*, the party which sought a judicial order addressing the status of a juvenile failed to comply with a requirement that the filing be verified contained in a provision of North Carolina's juvenile code. As in *In re T.R.P.*, the trial court entered an

order notwithstanding this deficiency. The only salient difference is that in this case, DSS filed a motion rather than a petition. However, this difference is not legally significant. Subsection 7B-1104 draws no distinction between the verification requirement as it applies to petitions and motions in the cause filed pursuant to N.C.G.S. § 7B-1102. The interests the verification requirement serve do not vary with the manner in which a termination proceeding is initiated. A trial court's jurisdiction to conduct an underlying abuse, neglect, or dependency proceeding does not automatically provide the court with jurisdiction to conduct a termination proceeding.

¶ 28 Accordingly, the verification requirement contained in N.C.G.S. § 7B-1104 is jurisdictional as applied to both a petition for termination and a motion for termination. Because DSS failed to verify its motion for termination of respondent's parental rights, "the trial court ha[d] no power to act." *In re T.R.P.*, 360 N.C. at 598. Therefore, we vacate the trial court order terminating respondent's parental rights in Oscar and remand for further proceedings not inconsistent with this opinion.

VACATED.

Justice BARRINGER, dissenting.

¶ 29

> Ending a parent-child relationship is a decision the court must weigh carefully, mindful of constitutional protections and statutory safeguards. Those safeguards, however, are to be applied practically so that the best interests of the child—the polar star in controversies over child neglect and custody—are the paramount concern.

In re L.M.T., 367 N.C. 165, 173 (2013); *see also In re Montgomery*, 311 N.C. 101, 109 (1984).

¶ 30 Here, not only does the majority's result disregard this paramount concern, but the majority does so by ignoring the legislature's stated policy goals with respect to termination of parental rights, the plain language of the relevant statutes, and the statutory scheme of the Juvenile Code. Accordingly, I respectfully dissent.

¶ 31 In this matter, the Transylvania County Department of Social Services (DSS) filed a verified juvenile petition alleging the neglect and dependency of Oscar on 27 November 2017. Subsequently, the trial court adjudicated Oscar a neglected and dependent juvenile. Then, in

the same cause, DSS filed a motion for termination of parental rights on 25 March 2020 pursuant to N.C.G.S. § 7B-1102(a). However, the motion was not verified. After a hearing on the termination-of-parental-rights motion, the trial court terminated respondent's parental rights by order entered on 21 August 2020.

¶ 32 No one complained of the lack of verification at any time before the trial court. Respondent's sole basis for his appeal of the termination-of-parental-rights order is that "[t]he trial court lacked subject matter jurisdiction to terminate [respondent's] parental rights because [DSS] failed to verify its termination[-]of[-]parental[-]rights motion in the cause as required by N.C.[G.S.] § 7B-1104."

¶ 33 The legislature has expressly "declare[d] as a matter of legislative policy with respect to termination of parental rights" four purposes of Article 11 of the Juvenile Code in N.C.G.S. § 7B-1100. N.C.G.S. § 7B-1100 (2019). As relevant to this matter, the legislature established that the "general purpose of [Article 11] is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile," N.C.G.S. § 7B-1100(1), and "the further purpose of [Article 11 is] to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents," N.C.G.S. § 7B-1100(2).

¶ 34 Therefore, the clear statutory language instructs us to interpret the statutes as setting forth judicial procedures—not subject matter jurisdictional requirements. To comply with this statutory mandate, we must construe statutes in Article 11 to set forth judicial procedures unless the plain language of the statute indicates it is a jurisdictional requirement.

¶ 35 Additionally, in almost all situations, making a judicial procedure a requirement for the trial court's subject matter jurisdiction directly contradicts the text of Article 11: that juveniles should receive a permanent plan of care at the earliest possible age. *See* N.C.G.S. § 7B-1100(2). Challenges to jurisdiction, unlike judicial procedures, can be raised for the first time on appeal and, if successful, render the underlying proceeding void ab initio. *In re T.R.P.*, 360 N.C. 588, 590, 595 (2006).

¶ 36 In matters arising under the Juvenile Code, the legislature by enacting statutes has established the trial court's subject matter jurisdiction. *In re K.J.L.*, 363 N.C. 343, 345 (2009). It is the legislature—not the

courts—that "can, within the bounds of the Constitution, set whatever limits it wishes on the possession or exercise of that jurisdiction." *In re J.M.*, 377 N.C. 298, 2021-NCSC-48, ¶ 15 (quoting *In re M.I.W.*, 365 N.C. 374, 377 (2012)). As enacted by the legislature, the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent," N.C.G.S. § 7B-200(a) (2019), and once obtained, "jurisdiction shall continue until terminated by order of the [trial] court or until the juvenile reaches the age of [eighteen] years or is otherwise emancipated, whichever occurs first," N.C.G.S. § 7B-201(a) (2019). Thus, "[w]hen the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in [N.C.]G.S. [§] 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile." N.C.G.S. § 7B-1102(a) (2019).

¶ 37 As recognized by this Court in *In re T.R.P.*, "the provisions in Chapter 7B establish one continuous juvenile case with several interrelated stages, not a series of discrete proceedings." 360 N.C. at 593. Therefore, as it relates to verification, "[a] trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified *petition*." *Id.* (emphasis added); *see also In re K.S.D.-F.*, 375 N.C. 626, 633 (2020) ("Jurisdiction arises upon the filing of a properly verified juvenile petition and extends through all subsequent stages of the action." (cleaned up)).

¶ 38 Further, the legislature has limited the trial court's jurisdiction as to termination of parental rights by enacting N.C.G.S. § 7B-1101, which states as follows:

> § 7B-1101 Jurisdiction
>
> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The

> court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106. Provided, further, that the clerk of superior court shall have jurisdiction for adoptions under Chapter 48 of the General Statutes.

N.C.G.S. § 7B-1101 (2019); *see also In re A.L.L.*, 376 N.C. 99, 105 (2020) ("[A] trial court lacks jurisdiction over a termination petition if the requirements of N.C.G.S. § 7B-1101 have not been met, even if there is an underlying abuse, neglect, or dependency action concerning that juvenile in the district in which the termination petition has been filed.").

¶ 39 Thus, the Juvenile Code, its articles, and statutes, as previously recognized by this Court, all establish that jurisdiction in this matter is vested with the trial court upon the filing of the juvenile *petition* and continues uninterrupted until the juvenile's majority, emancipation, or a trial court's order even for termination of parental rights if the legislature's enactment regarding jurisdiction, N.C.G.S. § 7B-1100, is satisfied.

¶ 40 Here, DSS failed to verify a motion for termination of parental rights that it filed in a pending juvenile abuse, neglect, and dependency proceeding. But DSS had already verified the juvenile *petition* underlying the action, and there is no contention that the trial court lacked jurisdiction under N.C.G.S. § 7B-1101. While this Court has held that the verification requirement for a juvenile petition alleging abuse, neglect, or dependency pursuant to N.C.G.S § 7B-403(a) was jurisdictional in *In re T.R.P.*, 360 N.C. at 588, this appeal involves an unverified *motion* filed pursuant to N.C.G.S. § 7B-1102(a) in the abuse, neglect, or dependency cause. Thus, to the extent, our prior caselaw has held that pleadings and petitions commencing an action and their amendments thereto are jurisdictional defects "for certain causes of action created by statute," *id.* (citing *Martin v. Martin*, 130 N.C. 19, 20 (1902)[1] (discussing an unverified amendment to a complaint in a divorce action)), they do not resolve the issue before this Court now.

1. Notably, as the dissent in *In re T.R.P.* observed, *Martin* was addressed by this Court prior to the adoption of notice pleading. *In re T.R.P.*, 360 N.C. 588, 606 (2006) (Newby, J., dissenting).

¶ 41 Further, nothing about the statutory language or statutory scheme supports the view that verification of a motion for termination of parental rights in a pending juvenile case is required for the trial court's subject matter jurisdiction. "In construing statutory language, 'it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.' " *In re B.O.A.*, 372 N.C. 372, 380 (2019) (quoting *Lunsford v. Mills*, 367 N.C. 618, 623 (2014)). Here, N.C.G.S. § 7B-1104 is entitled "Petition or motion" and makes no reference to jurisdiction. N.C.G.S. § 7B-1104 (2019). Section 7B-1101, previously quoted herein and entitled "Jurisdiction," which addresses jurisdiction for termination-of-parental-rights motions, also contains no cross-reference to N.C.G.S. § 7B-1104 or reference to a verification requirement. N.C.G.S. § 7B-1101. This Court has previously recognized that in these circumstances—when the legislature neither mentions jurisdiction in the statute at issue nor references it in the statute entitled "jurisdiction"—the legislature did not intend such statute's requirements "to function as prerequisites for [trial] court jurisdiction." *In re D.S.*, 364 N.C. 184, 193–94 (2010).[2]

¶ 42 Finally, deeming verification of a motion in the cause a jurisdictional requirement in an abuse, neglect, or dependency proceeding cannot be justified. This Court addressed in *In re T.R.P.* the verification requirement for initiating "[a] juvenile abuse, neglect, or dependency action under Chapter 7B [that] may be based on an anonymous report." 360 N.C. at 591. Unlike a juvenile petition, the filing of a termination-of-parental-rights motion in a juvenile abuse, neglect, or dependency proceeding is frequently based on the underlying verified juvenile abuse, neglect, or dependency petition and subsequent conduct and course of dealings between the parents, DSS, the juvenile, and the guardian ad litem, much of which the trial court is privy to from hearings. Section 7B-906.1(a) states as follows:

> The [trial] court shall conduct a review hearing within 90 days from the date of the initial dispositional

2. While the majority acknowledges that *In re T.R.P.* did not address the statute and issue before this Court in this matter, it nevertheless relies solely on that opinion, deeming itself bound, while ignoring this Court's other precedent like *In re D.S.* and other precedent on statutory construction. Such precedent cannot be reconciled with a reading that this Court's construction in *In re T.R.P.* of N.C.G.S. § 7B-403(a) (2005) ("[T]he petition shall be drawn by the [DSS] director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.") mandates that anytime something "shall be verified," it is a jurisdictional requirement. *In re T.R.P.*, 360 N.C. at 591. In fact, *In re T.R.P.* acknowledges the contrary: "[F]or *certain* causes of action created by statute, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional." *Id.* (cleaned up) (emphasis added).

> hearing held pursuant to [N.C.]G.S. [§] 7B-901. Review hearings shall be held at least every six months thereafter. Within [twelve] months of the date of the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing. Review hearings after the initial permanency planning hearing shall be designated as permanency planning hearings. Permanency planning hearings shall be held at least every six months thereafter or earlier as set by the court to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.

N.C.G.S. § 7B-906.1(a) (2019).

¶ 43 Further, there is no change in the status, physically or legally, between the parent and the juvenile upon the filing of a motion in the cause to terminate parental rights. In other words, it does not "result[ ] in DSS'[s] immediate interference with a respondent's constitutionally-protected right to parent his or her children." *In re T.R.P.*, 360 N.C. at 591–92. Instead, the relationship between the parent and the juvenile does not change until an adjudicatory hearing—where the movant has the burden of proof; the rules of evidence for civil actions apply; and the trial court must take evidence, find facts based on clear, cogent, and convincing evidence, adjudicate the existence of grounds for termination pursuant to N.C.G.S. § 7B-1111, and reduce to writing its findings and conclusions—and a dispositional hearing to determine "whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019); *see* N.C.G.S. §§ 7B-1109 to -1110. Thus, while the gravity of filing a termination-of-parental-rights motion is undeniable, there are no identifiable material consequences to the parent or the juvenile from the lack of verification of a motion for termination of parental rights in an abuse, neglect, or dependency proceeding over which the trial court is exercising jurisdiction over both a juvenile and the juvenile's parent pursuant to a verified petition. Thus, unlike this Court in *In re T.R.P.*, the majority reads into a legislative enactment, devoid of reference to jurisdiction, an intent to make a jurisdictional requirement without substantiating reasons. *See In re T.R.P.*, 360 N.C. at 591.

¶ 44 In conclusion, the verification requirement set forth in N.C.G.S. § 7B-1104 for a motion for termination of parental rights filed in an abuse, neglect, or dependency proceeding where the trial court has

subject matter jurisdiction pursuant to a verified abuse, neglect, or dependency juvenile petition cannot and should not be deemed jurisdictional by this Court. Instead, it is a procedural requirement.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

IN THE MATTER OF Z.M.T.

No. 416A20

Filed 29 October 2021

Termination of Parental Rights—ineffective assistance of counsel—failure to show prejudice

On appeal from an order terminating a mother's parental rights, the mother's ineffective assistance of counsel claim lacked merit because, even assuming her counsel's performance was deficient (where counsel may have failed to ensure the mother received notice of the date and time of the termination hearing, and where counsel did not cross-examine the department of social services' witnesses, offer any witnesses on the mother's behalf, or offer a closing argument at the termination hearing), the mother failed to demonstrate that she was prejudiced as a result. The mother neither challenged the trial court's findings and conclusions of law in the termination order nor argued on appeal that, but for counsel's deficient performance, there was a reasonable probability of a different result.

Justice EARLS dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 11 June 2020 by Judge Keith B. Mason in District Court, Beaufort County. This matter was calendared and heard before the Supreme Court on 30 August 2021.

Miller & Audino, LLP, by Jay Anthony Audino, for petitioner-appellee Beaufort County Department of Social Services.

Thomas N. Griffin, III, for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent-mother appeals from an order terminating her parental rights.[1] We affirm.

I. Factual and Procedural History

¶ 2 On May 31, 2019, the Beaufort County Department of Social Services (DSS) received a report alleging that respondent-mother was using heroin and cocaine in the presence of her two children. Respondent-mother was eight months pregnant at the time. On June 7, 2019, respondent-mother gave birth to a minor child, Zoe,[2] who tested positive for heroin and cocaine. DSS received additional child protective services reports on June 8 and 9, 2019.

¶ 3 Respondent-mother received education on appropriate care for a newborn child, but she appeared agitated when the issue of improper handling of Zoe arose. These instances caused concern amongst hospital staff regarding the ability of respondent-mother and Zoe's father to provide appropriate care for the child. After an argument with Zoe's father and against the advice of her doctor, respondent-mother checked herself out of the hospital, leaving Zoe alone in the hospital without a parent on the premises. As a result, Zoe was sent to the Special Care Unit. While there, she was prescribed morphine to help curtail her withdrawal symptoms.

¶ 4 On June 20, 2019, DSS filed a petition alleging that Zoe and her two siblings were neglected juveniles. The petition recited the above facts, and an adjudication hearing was held on July 24, 2019. Respondent-mother consented to entry of an order in which Zoe was adjudicated a neglected juvenile. On August 7, 2019, the trial court entered a dispositional order which set the permanent plan as reunification with a concurrent plan of adoption. Respondent-mother was ordered to complete a psychological evaluation, individual therapy, parenting classes, obtain and maintain stable housing and employment, and engage in substance abuse treatment and recovery therapy.

¶ 5 On November 13, 2019, respondent-mother tested positive for morphine, cocaine, benzoylecgonine, and opiates. Respondent-mother refused to submit to subsequent drug screens on January 2, January 7, January 29, and February 18, 2020.

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1. The biological father's parental rights were terminated in the same order; however, he did not appeal.

2. A pseudonym is used to protect the minor child's identity and for ease of reading.

¶ 6 On January 22, 2020, a permanency planning hearing was conducted. The trial court determined that barriers to reunification existed due to respondent-mother's substance abuse, inconsistent parenting, mental health issues, and decision-making. Additionally, the trial court's permanency planning order detailed respondent-mother's attempts to comply with the dispositional order. The court found that after completing her psychological evaluation, respondent-mother was diagnosed with "Opioid Use Disorder and Other Specified Depressive Disorder." Further, the court found that respondent-mother was not honest with the examiner and that she had failed to seek therapy and related medication. The court also found that respondent-mother was still in need of meaningful substance abuse treatment and employment. Ultimately, the trial court concluded that respondent-mother had failed to make sufficient progress within a reasonable period of time under her case plan and that additional progress was required.

¶ 7 Based on the above findings, the trial court ordered respondent-mother to comply with recommended treatment, attend therapy, obtain and maintain stable housing and employment, attend parenting classes, and submit to random drug testing. The order specifically found that "[respondent-mother] was given an opportunity to discuss this order with her attorney . . . prior to its entry. [Respondent-mother] understands the requirements that this order places upon her; she consents to the decretal portion of this order." Notably, the last entry in the decretal portion of the order stated "[t]his matter shall be scheduled for a permanency planning hearing on **June 10, 2020**."

¶ 8 On March 27, 2020, before the scheduled permanency planning hearing, DSS filed a motion to terminate respondent-mother's parental rights based on neglect and dependency pursuant to N.C.G.S. § 7B-1102. Respondent-mother did not file a responsive pleading or otherwise address the allegations in the motion to terminate parental rights. Notice of the motion was sent to respondent-mother's counsel, who had represented her at the adjudication hearing in July 2019, the dispositional hearing in August 2019, and the first permanency planning hearing in January 2020.

¶ 9 Prior to filing of the motion to terminate parental rights, respondent-mother was arrested and charged with three counts of manufacturing, selling or delivering a controlled substance[3] within 1000 feet of a school, one count of maintaining a dwelling or place for

3. On February 25, 2020, respondent-mother was found with Zoe's father and 2.5 grams of cocaine, 1.5 grams of heroin, and 20 grams of marijuana.

controlled substances, one count of possession of drug paraphernalia, one count of robbery with a deadly weapon, and one count of assault with a deadly weapon inflicting serious injury.[4] Between March and June 2020, respondent-mother did not make any effort to visit with Zoe.

¶ 10 Hearing on the motion to terminate parental rights was scheduled for June 10, 2020, the same day as the previously scheduled second permanency planning hearing. Respondent-mother did not appear in court. Respondent-mother's counsel moved to continue the case and stated in open court that she sent notice of the hearing to respondent-mother, who was "generally present in court for such hearing[s]." The trial court denied the motion and the hearing proceeded without further inquiry.

¶ 11 DSS called one witness during the grounds phase of the hearing and a different witness during the best interests phase. Respondent-mother's counsel did not cross-examine either witness, did not offer any witnesses on respondent-mother's behalf, and declined to offer a closing argument. On June 11, 2020, the trial court terminated respondent-mother's parental rights, concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) and (6), and that termination was in Zoe's best interests.

¶ 12 The trial court determined that respondent-mother had not taken advantage of the multiple opportunities she was provided to work towards regaining custody of Zoe. Instead, respondent-mother failed to complete therapy, refused to take drug tests, was charged with both drug and violent offenses, stopped visiting with Zoe, and admitted to increased heroin use. The trial court further found that respondent-mother's lack of stable housing and instability contributed to her inability to care for Zoe and that respondent-mother's actions "present[ed] the risk of severe harm to the child, including a real risk of serious bodily harm or injury to the child." Based on these findings, the trial court concluded that "grounds exist to terminate the parental rights of [respondent-mother] . . . under N.C.G.S. Sections 7B-1111(a)(1)&(6)."

¶ 13 During the trial court's best interest determination, it incorporated the above findings and further found there was a "high likelihood that [Zoe] will be adopted by her current foster parents" because of the strong bond Zoe had developed with them. Such a bond, the trial court found, did not exist in the "attenuated relationship" between Zoe and respondent-mother. Moreover, the trial court found that it was "evident that further reunification efforts with [respondent-mother were]

4. On January 15, 2020, respondent-mother was arrested for assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon after she took the victim's car and wallet following an altercation.

inconsistent with the juvenile's health, safety, and welfare." As a result, the trial court concluded it to be in Zoe's best interest for respondent-mother's parental rights to be terminated.

¶ 14 Respondent-mother appeals, arguing that the trial court failed to ensure that respondent-mother received effective assistance of counsel.

II. Analysis

¶ 15 A parent in a termination of parental rights proceeding has a statutory right to counsel pursuant to N.C.G.S. § 7B-1101.1, which inherently requires effective assistance from that counsel. *See In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 32 (2020) ("Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless.").

¶ 16 To succeed in a claim for ineffective assistance of counsel, respondent must satisfy a two-prong test, demonstrating that (1) counsel's performance was deficient; *and* (2) such deficient performance by counsel was so severe as to deprive respondent of a fair hearing. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). "To make the latter showing, the respondent must prove that 'there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.' " *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 33 (2020) (quoting *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248).

¶ 17 Assuming without deciding that counsel's performance was deficient, respondent-mother cannot prevail on her ineffective assistance of counsel claim because she has failed to demonstrate that she was prejudiced by any alleged deficiency in performance by counsel. Respondent-mother does not argue, and therefore cannot show, that there was a reasonable probability of a different result. Respondent-mother has not challenged on appeal the trial court's findings of fact or conclusions of law that the grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (6) exist or that the termination was in Zoe's best interest. We therefore affirm the trial court's order terminating respondent-mother's parental rights.

III. Conclusion

¶ 18 Respondent-mother has failed to demonstrate that, but for such the alleged deficiency by counsel, there was a reasonable probability of a different result. The trial court's order terminating respondent-mother's parental rights is affirmed.

AFFIRMED.

Justice EARLS dissenting.

¶ 19 "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982). A vital aspect of a fundamentally fair termination proceeding is a parent's "right to counsel, and to appointed counsel in cases of indigency." N.C.G.S. § 7B-1101.1(a) (2019). This statutory right to counsel necessarily includes a right to effective counsel. *In re T.N.C.*, 375 N.C. 849, 854 (2020). Otherwise, a parent's right to counsel would be rendered meaningless. *See State v. Sneed*, 284 N.C. 606, 612 (1974) (stating that the right to counsel "is not intended to be an empty formality but is intended to guarantee effective assistance of counsel."); *see also In re Bishop*, 92 N.C. App. 662, 664 (1989) ("By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation.").

¶ 20 In this case, respondent-mother's counsel's allegedly deficient performance appears to have deprived her of the opportunity to develop a record which could support her contention that she received ineffective assistance of counsel (IAC). Rather than examine her IAC claim, the majority assumes without deciding that counsel's performance was deficient, before summarily concluding that she could not have received IAC because she could not have been prejudiced. But this reasoning places respondent-mother in an impossible bind. If it is correct that her counsel's performance was so deficient that it deprived her of the opportunity to develop a record which would support her claim of prejudice, then denying her claim without further factfinding means she could never prove prejudice, even if she did indeed receive IAC.

¶ 21 The majority's decision gives short shrift to an important guarantor of the fairness of our juvenile system. In my view, the record plausibly supports respondent-mother's claim that her counsel's performance during the termination proceedings was deficient. Further, counsel's performance appears to have deprived respondent-mother of a record which allows this Court to meaningfully assess whether or not counsel's performance was actually deficient and whether she was prejudiced thereby. Under these circumstances, I believe the proper course is to remand to the trial court for further factfinding in order to ensure that a decision implicating her fundamental rights as a parent is based upon an adequately developed record. Therefore, I respectfully dissent.

I. The ineffective assistance of counsel standard in termination proceedings

¶ 22 The standard for assessing a parent's claim to have received IAC in a termination proceeding mirrors the standard utilized for assessing a criminal defendant's claim to have received IAC at trial. "To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive her of a fair hearing." *In re T.N.C.*, 375 N.C. at 854. "To make the latter showing, the respondent must prove that 'there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.' " *Id.* (quoting *State v. Braswell*, 312 N.C. 553, 562 (1985)). Thus, as when a criminal defendant raises an IAC claim on appeal, a respondent-parent who raises an IAC claim on appeal of an order terminating his or her parental rights must prove that counsel's performance was deficient and that he or she was prejudiced thereby.

¶ 23 However, there is an important procedural difference which is relevant when an appellate court addresses an IAC claim raised on appeal by a criminal defendant as opposed to one raised by a respondent-parent. If a criminal defendant does not prevail on appeal, the defendant can still challenge certain errors allegedly committed by the trial court by filing a motion for appropriate relief (MAR). N.C.G.S. § 15A-1420 (2019). When a criminal defendant raises an IAC claim on appeal, but the record is insufficient to knowledgably determine the merits of the defendant's claim, an appellate court may dismiss the claim without prejudice to be considered on defendant's subsequent MAR. This is the proper course whenever "[t]he record developed at trial d[oes] not contain any information affirmatively tending to show" an evidentiary basis for deciding whether an IAC claim has been proven. *State v. Hyman*, 371 N.C. 363, 384 (2018).

¶ 24 By contrast, after a termination proceeding has concluded, a respondent-parent lacks an avenue to challenge the fairness of the proceedings except on direct appeal. There is no procedural vehicle for bringing a post-judgment MAR. This creates a significant hurdle for respondent-parents who allege they received IAC during a termination proceeding. As we have noted in the criminal context, "because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." *State v. Fair*, 354 N.C. 131, 167 (2001). The same can be true in the termination of parental rights context also.

¶ 25 A respondent-parent who alleges IAC does not have the same opportunity to develop a factual record in support of his or her claim on

post-conviction review as a criminal defendant. In part, this is by design. In the juvenile context, the interests of the juvenile in obtaining a secure, permanent placement weigh against allowing proceedings to continue after a termination order has been entered. Nevertheless, the importance of the parent's interest at stake in a termination proceeding, and the need to assure that every parent receives the fundamental procedural protections to which he or she is constitutionally entitled, require that an appellate court carefully scrutinize every credible IAC claim raised on direct appeal from a termination proceeding. In a case where the record is insufficient to allow a reasoned disposition of the parent's IAC claim—and especially in a case where the insufficiency appears to result from counsel's performance—an appellate court should reverse the order terminating the respondent-parent's parental rights and remand for an evidentiary hearing. *Cf. In re B.L.H.*, 239 N.C. App. 52, 62–63 (2015). I believe precisely this action is warranted in the present case.

II. Respondent-mother has plausibly alleged that her counsel was deficient by failing to provide adequate notice and failing to advocate on her behalf at her termination hearing

¶ 26 The majority "assum[es] without deciding that counsel's performance was deficient." It is of course generally appropriate for an appellate court to dispose of a case on the narrowest grounds possible without resolving any unnecessary issues. Nonetheless, in my view, the better course in this case would have been to closely examine respondent-mother's claim on both prongs, given that respondent-mother claims her counsel's deficient performance deprived her of a record adequate to prove prejudice.

¶ 27 In this case, respondent-mother argues counsel was deficient in two ways. First, she contends that her attorney rendered deficient performance when the attorney failed to ensure that respondent-mother received notice of the date and time of the termination hearing. Second, she contends that her attorney rendered deficient performance when the attorney failed to advocate on her behalf at the termination proceeding conducted in respondent-mother's absence. Although respondent-mother has raised plausible allegations which could meet her burden on the first prong of the IAC analysis, I believe the record does not contain critical information necessary to ascertaining whether counsel's performance was deficient at the termination proceeding due to these two alleged failures.

¶ 28 The transcript of the termination hearing reflects that when the proceeding began, respondent-mother was not present. Respondent-

mother's counsel joined respondent-father's counsel's motion to continue the hearing, representing that he had "sent notice of this hearing to my client" and that she "was generally present in court for such hearing[s]." The trial court denied the motion to continue. However, the record in this case reveals significant factual discrepancies regarding respondent-mother's living situation which call into question whether her attorney's efforts to provide notice of the termination hearing were adequate. Respondent-mother maintained multiple physical addresses up until the time of the termination hearing and moved to a new residence at least once during the pendency of the termination proceedings. She appeared for every prior substantive hearing during the termination proceeding.

¶ 29 An attorney may render deficient performance in a termination proceeding by failing to adequately communicate with a respondent-parent. *Cf. In re B.L.H.*, 239 N.C. App. at 63 (concluding that respondent-parent received IAC where "counsel did not make sufficient efforts to communicate with Respondent in order to provide him with effective representation and [ ] this failure deprived Respondent of a fair hearing"). Thus, in my view, the record raises meaningful questions regarding whether or not counsel's efforts to communicate with respondent-mother and notify her of the hearing, which cannot be answered without further factual development.

¶ 30 At the termination hearing, DSS called one witness during the adjudicatory stage and another witness during the dispositional stage. Respondent-mother's counsel remained present in the courtroom while the hearing was conducted. However, counsel did not cross-examine either of DSS' witnesses or raise any objections during their testimony. Counsel also chose not to present any evidence or offer any rebuttal witnesses on respondent-mother's behalf. Counsel declined to offer any closing argument.

¶ 31 "It is well established that attorneys have a responsibility to advocate on behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560 (2010) (citing *State v. Staley*, 292 N.C. 160 (1977)). It is possible there may be circumstances under which counsel's choice to remain silent during a proceeding is strategic. Nonetheless, an appellate court is "is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose." *State v. Allen*, 2021-NCSC-88, ¶ 32. On the record as currently comprised, this Court cannot determine whether or not counsel's failure to advocate on respondent-mother's behalf at the termination hearing resulted from a strategic choice made after consultation, resulted from respondent-mother's failure to provide

counsel with the information she needed to represent her, or resulted from counsel's own decisions or omissions. Accordingly, I would conclude that these questions must be resolved in an evidentiary hearing before conclusively determining whether respondent-mother's counsel rendered deficient performance at her termination hearing.

III. Even if counsel rendered deficient performance, the record is inadequate to determine whether respondent-mother was prejudiced

¶ 32 To prove her IAC claim, respondent-mother must prove prejudice. To prove prejudice, she must show "a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings," that is, that the court would not have entered an order terminating respondent-mother's parental rights. *In re T.N.C.*, 375 N.C. at 854.[1] In general, a parent meets this burden by identifying factual evidence which rebuts the trial court's factual findings or legal arguments which undercut the trial court's legal conclusion that grounds existed to terminate a respondent-parent's parental rights and that doing so was in the best interests of the juvenile. In certain circumstances, this evidence and these arguments might be found in the record and transcript produced at trial.

¶ 33 In this case, the record and transcript do not and cannot support respondent-mother's claim precisely because of her counsel's failure to advance arguments on her behalf or advocate for her interests at the termination hearing. Again, it is not necessarily the case that counsel's failure to file an answer, advocate at the hearing, cross examine any witnesses, or introduce evidence constituted deficient performance. However, if counsel's actions were in fact so egregious as to constitute deficient performance, then it is profoundly unfair to reject respondent-mother's claim on the grounds that the record produced by that counsel's actions does not indicate that respondent-mother was

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1. Although I acknowledge that our precedents equate the two ways of defining prejudice, arguably proof that an attorney's deficient performance was "so serious as to deprive [a parent] of a fair hearing," *In re T.N.C.*, 375 N.C. 849, 854 (2020) (quoting *In re Bishop*, 92 N.C. App. 662, 669 (1989)), is not necessarily the same as evidence that "but for counsel's errors, there would have been a different result in the proceedings," *id.* (quoting *State v. Braswell*, 312 N.C. 553, 563 (1985)). It is certainly possible that a proceeding that was fundamentally unfair could still have arrived at the same outcome that would have resulted from a fair proceeding. Regardless, I note that United States Supreme Court in *Strickland* emphasized that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," which suggests something other than a purely outcome-determinative test for assessing prejudice. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

prejudiced. *Cf. Strickland v. Washington*, 466 U.S. 668, 710 (1984) ("The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.") (Marshall, J., dissenting). Again, the record does not allow us to determine one way or the other (1) whether counsel's performance was deficient, (2) if so, whether counsel's deficient performance resulted in the record being inadequate to assess prejudice, and (3) whether a fully developed record would support the conclusion that counsel rendered IAC. Thus, we do not have a sufficient record to determine the merits of respondent-mother's IAC claim.

IV. Conclusion

¶ 34 Proceedings which may result in the termination of a parent's rights to the care, custody, and control of their child must be fair. It is inconsistent with this fairness requirement to hold that in order to prevail on an IAC claim, a respondent-parent must prove counterfactually that the outcome of the proceeding would have been different but for counsel's deficient performance, solely relying on a record developed by an attorney whose allegedly deficient performance gives rise to the claim. In this case, respondent-mother has plausibly alleged that her counsel rendered deficient performance at her termination hearing. Further, counsel's actions appear to have deprived respondent-mother of a record which can support her IAC claim, and deprived this Court of the record necessary to resolve it. Accordingly, I respectfully dissent from the majority's affirmance of the order terminating respondent-mother's parental rights. Instead, I would reverse the order and remand for an evidentiary hearing to determine whether respondent-mother's counsel's representation was deficient and if so, whether respondent-mother was prejudiced thereby.

PLANTATION BUILDING OF WILMINGTON, INC.
v.
TOWN OF LELAND

No. 515A20

Filed 29 October 2021

Pretrial Proceedings—objection to class certification—after summary judgment granted—waived

In an action filed against a town (defendant), where defendant consented to and joined in plaintiff's motion for continuance, which indicated that the parties had agreed to file cross-motions for summary judgment first and then address class certification if the matter was not resolved during the summary judgment stage, defendant waived any objection it may have had to the trial court granting plaintiff's motion for class certification after it had granted plaintiff's summary judgment motion.

Appeal pursuant to N.C.G.S. § 7A-27(a) from orders entered on 19 August 2020 by Judge Jason C. Disbrow in Superior Court, Brunswick County. Heard in the Supreme Court on 30 August 2021.

Mark R. Sigmon, *Daniel K. Bryson*, *Martha A. Geer*, *Scott C. Harris*, *J. Hunter Bryson*, *and Christopher M. Theriault for plaintiff-appellee.*

Stephen V. Carey, *Charles C. Meeker*, *Corri A. Hopkins*, *Dan M. Hartzog Jr.*, *Katherine Barber-Jones*, *and Brian E. Edes for defendant-appellant.*

Ellis & Winters LLP, by Thomas H. Segars, *Joseph D. Hammond*, *and Scottie Forbes Lee*, *for North Carolina Association of Defense Attorneys*, *amicus curiae.*

BARRINGER, Justice.

¶ 1 In this matter, we must address whether the trial court erred when it granted a motion for class certification filed after a summary judgment motion had been granted in plaintiff Plantation Building of Wilmington, Inc.'s favor. On the record before us, we conclude no reversible error occurred as defendant, Town of Leland, waived any objection that it may have had to the purported error.

¶ 2 In this matter and as relevant to the issue before us, defendant consented to and joined in a motion for continuance filed by plaintiff, which indicated that the parties had agreed to file cross-motions for summary judgment and address class certification if the matter was not resolved during the summary judgment stage. The trial court granted the motion for continuance. Thereafter, plaintiff and defendant filed motions for summary judgment on 27 February 2020 and 4 March 2020 respectively. The trial court heard arguments from both parties on their respective motions for summary judgment at a hearing on 9 March 2020. On 12 March 2020, the trial court granted plaintiff's motion for summary judgment, resolving the issue of liability but not the issue of damages and effectively denying defendant's motion for summary judgment. Thereafter, plaintiff filed a motion for class certification. Defendant then filed a motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, objecting for the first time to the trial court addressing a motion for class certification after resolving the motions for summary judgment, as well as two other motions. On 19 August 2020, after a hearing on the motions, the trial court granted plaintiff's motion for class certification and denied defendant's motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and the two other motions filed by defendant. Defendant then appealed to this Court.

¶ 3 Since the motion for continuance identifies that the issue of class certification would be resolved after addressing the cross-motions for summary judgment and expressly states that "[b]oth parties to this action join in and consent to this Motion" and since the parties did follow this sequence, we conclude that defendant waived any objection that it may have had to the trial court granting plaintiff's motion for class certification after granting plaintiff's summary judgment motion. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26 (2004) ("[A] party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." (quoting *Roberts v. Grogan*, 222 N.C. 30, 33 (1942))); *Frugard v. Pritchard*, 338 N.C. 508, 512 (1994) ("A party may not complain of action which he induced."); *Klein v. Avemco Ins. Co.*, 289 N.C. 63, 68 (1975) ("Waiver sometimes has the characteristics of estoppel and sometimes of contract, but it is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up."); *Clement v. Clement*, 230 N.C. 636, 639 (1949) ("A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. The

term, therefore, covers every conceivable right—those relating to procedure and remedy as well as those connected with the substantial subject of contracts."). Accordingly, no reversible error occurred, and we need not address defendant's remaining arguments.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD LEAKS

No. 149PA20

Filed 29 October 2021

Homicide—jury instructions—self defense—request for modification—prejudice analysis

Even assuming the trial court erred by declining to give defendant's requested modified self-defense instruction in his trial for murder—that defendant must have believed it necessary "to use deadly force" against the victim, rather than "to kill" the victim—defendant failed to show that the alleged error was prejudicial. Under either instruction, the jury would have needed to find that defendant's belief was reasonable and that he did not use excessive force when he stabbed the victim, and uncontradicted evidence strongly suggested that defendant's use of deadly force was excessive and not reasonable.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 270 N.C. App. 317 (2020), finding no error after appeal from a judgment entered on 8 August 2018 by Judge Carla Archie in Superior Court, Mecklenburg County. Heard in the Supreme Court on 1 September 2021.

Joshua H. Stein, Attorney General, by Mary Carla Babb, Special Deputy Attorney General, for the State-appellee.

William D. Spence for defendant-appellant.

BARRINGER, Justice.

¶ 1 In this case, we review the Court of Appeals' holding that the trial court committed no error by declining to give defendant's requested modified self-defense instruction at trial. *State v. Leaks*, 270 N.C. App. 317, 324 (2020). Regardless of whether an error occurred, a party challenging jury instructions as erroneous must demonstrate on appeal that the error was prejudicial. Since defendant cannot meet this burden, we modify and affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 On 16 August 2016, Darrell Cureton was helping his girlfriend, Sylvia Moore, with yardwork at her house. Ms. Moore's brother, Eric Moore, was also outside with them. As they were working, defendant and his friend, Calvin Mackin, walked down a side street adjoining the house. Witness testimony differed on what happened next.

¶ 3 According to Mr. Moore, defendant and Mr. Mackin were walking across the street from Ms. Moore's home when they asked Mr. Moore for a cigarette. Defendant and Mr. Mackin crossed the street and entered Ms. Moore's yard, Mr. Moore gave them a cigarette, and then they walked back across the street. Hearing the men talking, Mr. Cureton walked over toward Mr. Moore. Defendant, who at that point was back across the street, started staring at Mr. Cureton and patting the knife he carried on his hip. Defendant was around six feet tall and weighed about two hundred pounds. Mr. Cureton was around five-foot-five and weighed approximately 150 to 160 pounds.

¶ 4 Mr. Cureton walked over to his pickup truck, which was parked on the street in front of Ms. Moore's home, and picked up a two-by-four board from the truck bed. Mr. Cureton then said, "[Defendant], go on, I don't want no trouble" and started walking away from defendant, back toward Ms. Moore's house. According to Mr. Moore, Mr. Cureton held the two-by-four straight across in front of himself, with one hand on either end. Mr. Cureton never held the two-by-four like a baseball bat and never swung it at defendant. When Mr. Cureton backed away, defendant sprinted across the street toward Mr. Cureton, holding the knife and exclaiming, "[T]hat will give me an excuse to kill [you]."

¶ 5 Mr. Moore further testified that as defendant drew close, Mr. Cureton dropped the two-by-four and tried to run away, but he ran into the wall of the house and fell. Defendant caught up to Mr. Cureton and stabbed him in the chest. After stabbing Mr. Cureton, defendant rejoined Mr. Mackin, and the two men slowly walked away.

¶ 6 Ms. Moore also testified at trial. According to Ms. Moore, Mr. Cureton was standing in the yard when defendant sprinted through the

bushes in her yard and bumped Mr. Cureton. As defendant moved away, Ms. Moore saw that defendant was holding a knife and Mr. Cureton was clutching his hands to his chest while blood started to appear. Ms. Moore further testified that before dating Mr. Cureton, she had dated defendant for five years.

¶ 7 Next, Veronique Streeter, a social worker with no relationship to any of the individuals directly involved in this case, testified. At the time of the incident, Ms. Streeter was leaving a building that was a block over from Ms. Moore's house. Ms. Streeter testified that upon hearing a commotion, she looked over and saw Mr. Cureton with his back to the house holding up a piece of wood, with a hand on each end, to protect himself from being hit. Ms. Streeter never saw Mr. Cureton swing the piece of wood at defendant or take offensive action. Instead, as Ms. Streeter watched, she saw defendant come toward Mr. Cureton, jabbing at him. After making the jabbing motions, defendant walked away, and Ms. Streeter saw a red patch start to appear on the front of Mr. Cureton's white shirt.

¶ 8 Accompanying Ms. Streeter that day was Theresa McCormick-Dunlap, who also had no relation to any of the individuals directly involved in this case. Ms. McCormick-Dunlap testified that when she looked towards Ms. Moore's house, she saw Mr. Cureton retreating as defendant pursued him. Mr. Cureton was holding a long piece of wood defensively in front of himself like a shield and blocking defendant's swings. Ms. McCormick-Dunlap never saw Mr. Cureton use the two-by-four like a club, swing it offensively, or even move towards defendant. However, Ms. McCormick-Dunlap did observe defendant making jabbing motions while he chased Mr. Cureton. Ms. McCormick-Dunlap testified that defendant was "pretty determined to get at [Mr. Cureton]," while Mr. Cureton, in contrast, was retreating and not even trying to fight back. Eventually, Ms. McCormick-Dunlap saw defendant land a good blow and then "swagger[ ] off" looking satisfied. When she approached Mr. Cureton, Ms. McCormick-Dunlap saw blood on his shirt.

¶ 9 Defendant testified to an alternative version of events. According to defendant, he and Mr. Mackin were walking down the sidewalk across the street from Ms. Moore's house when they saw Mr. Moore. Mr. Mackin asked Mr. Moore for a cigarette. While Mr. Mackin walked over to retrieve the cigarette, defendant stayed across the street on the sidewalk. Mr. Cureton then walked to the edge of the lawn and told him to, "[G]o ahead on" and, "[K]eep it moving." In the meantime, Mr. Mackin had obtained a cigarette and started back across the street to defendant. Mr. Mackin then said, "[L]ook out," and defendant heard some

"pitter-patter." When he turned around, defendant saw Mr. Cureton swinging at him with a two-by-four held like a baseball bat.

¶ 10 Defendant further testified that Mr. Cureton struck defendant on his back and then continued hitting defendant with the two-by-four. Defendant tried to block the blows with his hands and grab the two-by-four but was unsuccessful. According to defendant, he started to fear for his life because he could not get to his knife—a large Gerber the size of a machete. Mr. Cureton kept landing blows, striking defendant on his head, neck, forearms, knee, and shoulder. Defendant began to feel dizzy and see stars. After a couple more hits, defendant fell down, unstrapped his knife, and stabbed Mr. Cureton in the chest one time. Mr. Cureton stopped hitting defendant and ran back to the house. Defendant asserted that his only intent when he stabbed Mr. Cureton was to try to stop Mr. Cureton from beating him.

¶ 11 Mr. Mackin also testified during defendant's case-in-chief. Mr. Mackin testified that he and defendant were so close that they called each other cousins. According to Mr. Mackin, he and defendant were walking by Ms. Moore's house when Mr. Mackin heard some "hollering." Mr. Cureton then walked quickly toward defendant, holding a stick in the air like he was going to hit defendant on the head. Mr. Cureton swung the stick at defendant, but defendant dodged it. However, Mr. Mackin testified that he did not see anything that happened afterwards between defendant and Mr. Cureton.

¶ 12 Shortly after being stabbed by defendant, Mr. Cureton died. Dr. Jonathan David Privette, who examined Mr. Cureton's body, testified that he had suffered from two knife wounds. First, Mr. Cureton had sustained a laceration to his left shoulder. Second, Mr. Cureton had been stabbed in his left chest by a knife that was thrust in, partially removed, and then thrust in again one to two more times. The stab to the chest was severe enough to fracture a rib, perforate Mr. Cureton's lung at three separate locations, and pierce his heart, causing Mr. Cureton's death.

¶ 13 Additionally, two police officers and a medical professional who responded to the incident testified about defendant's appearance shortly after the stabbing occurred. According to the officers, the only injuries they observed were on defendant's arms, and they were minor. Additionally, the officers stated that defendant had no difficulties standing or walking. As for the medic who attended to defendant, she testified that though defendant complained of head pain, the medic could not find any injury to his head. The only injuries the medic observed were the minor injuries to defendant's arms and a swollen knee.

¶ 14 After both parties rested their case at trial, defendant requested the trial court give a modified version of North Carolina Pattern Jury Instruction 206.10, which outlines the elements of self-defense. The first element of Pattern Jury Instruction 206.10 states that a defendant must believe it necessary "to kill" the victim. N.C.P.I.–Crim 206.10. Defendant requested that the trial court modify the instruction to instead state that a defendant must believe it necessary "to use deadly force against the victim."[1] The State opposed defendant's proposed modification. After listening to both sides' arguments, the trial court denied defendant's request and instructed the jury using Pattern Jury Instruction 206.10 without modification. Immediately after the trial court finished instructing the jury, defendant renewed his objection to the unmodified self-defense instruction. On 8 August 2018, the jury returned a verdict of guilty of second-degree murder. Defendant appealed.

¶ 15 Before the Court of Appeals, defendant argued that the trial court (1) abused its discretion in denying defendant's motion for jury view, (2) erred by instructing the jury that defendant needed to have believed it was necessary "to kill" the victim in order to have acted in self-defense, and (3) erred in determining that defendant had a prior record level of IV. *Leaks*, 270 N.C. App. at 320–21. In a unanimous decision, the Court of Appeals found no error by the trial court. *Id.* at 321, 324, 326.

¶ 16 Defendant requested review by this Court pursuant to N.C.G.S. § 7A-31 to address the Court of Appeals' decision that the trial court did not err in giving Pattern Jury Instruction 206.10 without defendant's requested modification. We allowed defendant's petition.

II. Standard of Review

¶ 17 In criminal cases, appellate courts review challenges to jury instructions differently depending on whether the challenge was properly preserved at trial. When a party properly preserves an objection to a jury instruction, appellate courts review the instruction for harmless error pursuant to N.C.G.S. § 15A-1443(a). *State v. Lawrence*, 365 N.C. 506, 512 (2012). Unpreserved objections, on the other hand, are reviewed only for plain error. *Id.* To properly preserve an objection to a jury instruction, the appellate rules require that a party object before the jury retires to consider its verdict and state "distinctly that to which objection is

1. We note that defendant's request that the trial court substitute the words "to use deadly force" for the words "to kill" was based on footnote four in Pattern Jury Instruction 206.10. Given the confusion that this footnote caused during trial in this case, it is recommended that the North Carolina Pattern Jury Instruction Committee review N.C.P.I.–Crim 206.10.

made and the grounds of the objection." N.C. R. App. P. 10(a)(2). Here, defendant properly preserved his objection. Thus, we review for harmless error under N.C.G.S. § 15A-1443(a). *Lawrence*, 365 N.C. at 512.

¶ 18 " 'The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence' and 'promote[ ] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " *State v. Malachi*, 371 N.C. 719, 734 (2018) (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)). Accordingly, harmless-error review requires a defendant show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises," unless the error relates to a constitutional right. N.C.G.S. § 15A-1443(a) (2019). At no point in this case has defendant alleged that the unmodified jury instruction violated a constitutional right. Therefore, the burden of showing prejudice is upon defendant. *Lawrence*, 365 N.C. at 513.

III. Analysis

¶ 19 Defendant has not shown a reasonable possibility that had the modified self-defense instruction been given, a different result would have been reached at trial. While the trial court instructed the jury that to have acted in self-defense defendant needed to believe it necessary to kill the victim, the trial court further instructed the jury that this belief must be reasonable given "the fierceness of the assault, if any, upon [defendant]" as perceived by "a person of ordinary firmness." Defendant did not object to the reasonableness portion of the instruction at trial and does not challenge it on appeal. Accordingly, even if the trial court had instructed the jury that defendant needed to believe only that deadly force was necessary, as opposed to believing he needed to kill the victim, the jury would still need to have found that this belief was reasonable. Further, the trial court instructed the jury that, as a separate requirement of self-defense, defendant must not have used "excessive force," meaning, "more force than reasonably appeared to the [d]efendant to be necessary at the time of the killing."

¶ 20 At trial, the medical testimony revealed that, at most, defendant had suffered minor arm injuries and a swollen knee that were treated with a bandage and ice pack. In contrast, defendant admitted that he stabbed Mr. Cureton in the chest with his Gerber knife—a knife so large that it looked like a machete. As testified to by the doctor who examined Mr. Cureton's body, this one stab wound to Mr. Cureton's chest was a highly

lethal wound. The wound reflected that the knife was thrust in, partially removed, and then thrust in again one to two more times, causing a fractured rib, a perforated lung at three separate locations, a pierced heart, and ultimately Mr. Cureton's death. Defendant tendered no medical evidence to contradict this testimony.

¶ 21 Accordingly, defendant has not shown a reasonable possibility that even if the trial court had modified the self-defense instruction as requested, the jury would have found that defendant acted in self-defense. The uncontradicted medical evidence strongly suggests that defendant's use of deadly force was not reasonable under the circumstances but rather that it was excessive. Defendant's requested self-defense instruction, if given, would not have changed the trial court's charge to the jury that defendant's use of force must be reasonable and not excessive. As a result, defendant cannot show a reasonable possibility that a different result would have occurred at trial.

IV. Conclusion

¶ 22 Since defendant has not shown a reasonable possibility that a different result would have occurred at trial if the alleged error had not occurred, he cannot meet his burden of showing prejudice under harmless-error review. Therefore, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

STATE v. DEW

[379 N.C. 64, 2021-NCSC-124]

STATE OF NORTH CAROLINA
v.
JEREMY WADE DEW

No. 284PA20

Filed 29 October 2021

Assault—multiple charges—distinct interruption—beating

The State presented sufficient evidence that defendant committed two assaults where defendant beat his girlfriend in a trailer and then beat her in her car. The distinct interruption between the assault in the trailer and the assault in the car—when defendant ordered the victim to clean the bloody bed and help pack the car—allowed the reasonable conclusion that there were two distinct assaults. However, one of defendant's three assault convictions was vacated because there was insufficient evidence of two distinct assaults occurring in the trailer, where the beating in the trailer was one continuous assault, and different injuries or different methods of attack alone are insufficient evidence of multiple assaults.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 270 N.C. App. 458, 462 (2020), finding no error after appeal from judgments entered on 7 February 2018 by Judge John E. Nobles Jr. in Superior Court, Carteret County. Heard in the Supreme Court on 24 March 2021.

Joshua H. Stein, *Attorney General*, *by Wes Saunders*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for the defendant-appellant.*

HUDSON, Justice.

¶ 1 Here we must determine whether there is sufficient evidence, in the light most favorable to the State, that defendant committed multiple assaults against his girlfriend when the testimony tended to show that he beat her in her family's trailer and also in her car as they traveled home. Because we conclude that there was sufficient evidence of multiple assaults to submit the issue to the jury, we hold that the trial court did not err by denying defendant's motion to dismiss all but one assault charge.

I. Factual and Procedural Background

¶ 2 In 2016, Mindy Ray Davis and defendant Jeremy Wade Dew were in a relationship and living together in Sims, North Carolina. On 29 July 2016, Davis and defendant drove to Atlantic Beach with defendant's four-year-old daughter to spend the weekend with Davis's parents who owned a trailer there. Both Davis and defendant testified at trial, but gave different accounts of the events that occurred between 29 July and 31 July 2016.

¶ 3 The following is a summary of Davis's account: On 30 July 2016, defendant, Davis, and defendant's daughter spent the evening outside socializing with neighbors. Davis testified that around 9:00 p.m., she took defendant's daughter back inside the trailer to put her to bed. The trailer had three bedrooms. The bedroom at the front of the trailer where defendant and Davis stayed was separated from the other two bedrooms by the communal living spaces. Davis stayed with defendant's daughter until she fell asleep on the couch in the living room around 9:30 p.m. or 9:45 p.m.

¶ 4 When Davis went back outside, she and defendant went a few trailers over to hang out with her cousin from Virginia. According to her testimony, Davis danced with her cousin and defendant's "whole demeanor changed." Defendant left the trailer and got in the car, drove down the street of the trailer park, drove back, and ultimately went inside the trailer he was staying in with Davis and locked Davis out. After Davis called defendant's phone several times and knocked on the window of the trailer, defendant let her into the trailer.

¶ 5 Once inside, Davis walked to the bedroom at the front of the trailer to change into clothing to sleep in. Davis testified that defendant "just hauled off and hit [her] upside the head." She testified that defendant hit her "over and over,"—a continuous, nonstop beating—for at least two hours. Specifically, defendant hit her "upside the head and ear, on each side," "kicked [her] in the chest," bit her nose and her ear, "punched [her] in the nose," "head-butted [her] twice," and "strangled [her] until vomiting." She recounted that during the attack defendant called her a "slut" and told her that she embarrassed him and that she was making him do this.

¶ 6 Davis testified that she did not fight him back because she was too scared and had never been through anything like that before. Defendant also threatened to throw her in the Buckhorn Reservoir if Davis said anything to defendant's ex-wife and told Davis he could be the next "Tick Bailey," a reference to a man who killed his ex-wife. Davis testified

that defendant told her if she made any noise, he would kill everyone in the trailer.

¶ 7 When the beating was over, defendant said "[w]e're leaving and we're going home." He made Davis take the sheets off the bed, which were stained with her blood, and clean the mattress cover. Davis wiped down the mattress cover and took the sheets off the bed and put them on the dresser. Davis grabbed their bags and took them out to the car. At that point, defendant went to get his daughter off the couch and made Davis get into the driver's seat of the car. He then changed his mind and made Davis get into the passenger's seat. Defendant put his daughter in the backseat of the car.

¶ 8 Davis testified that during the entire car ride back to Sims defendant hit her on the side of her head where she ultimately ended up with a ruptured eardrum. Defendant pulled off the road several times, reached over and was "jacking [her] up to the ceiling of the car, strangling [her]." Davis estimated that three times defendant made her take off her seat belt and open the door, and told her that he was going to push her out. Defendant also threw Davis's phone out of the window of the car.

¶ 9 They arrived in Sims approximately two hours after they left Atlantic Beach. When they arrived, defendant told Davis that if she called the police or went to stay with her sister, he would cut himself with a knife and say that she did it so that she would have to go to jail. Davis testified that she believed defendant because she thought he was "crazy enough to do something like that." The next morning, Davis's sister came to the house and called 911.

¶ 10 The parties stipulated that Davis suffered a concussion, a ruptured eardrum, and a nondisplaced nose fracture. She underwent two surgeries to save her hearing due to the ruptured eardrum.

¶ 11 Defendant also testified at trial. According to defendant, sometime after dinner on 30 July 2016, he and Davis went to a party a few trailers down from Davis's parents' trailer. They were at the party for about an hour and a half, and defendant went back to the trailer to check on his daughter every once in a while.

¶ 12 One time after checking on his daughter, defendant returned to find Davis "with another man." Defendant testified that he felt "disgusted," "angry," "[h]urt," and "[e]mbarrassed." He went back to the trailer and debated calling his parents to pick him and his daughter up, but decided not to. Defendant did not remember locking the trailer door, but he received a text from Davis that said she was locked out, so defendant unlocked the door for her, and she came inside. According to defendant,

Davis tried to frantically explain the situation while defendant began packing up his things to leave.

¶ 13 Defendant testified that when he bent over to get his cell phone charger, Davis came up behind him, bit him on his left shoulder, wrapped her nails around him, and hit him. In response, defendant bucked his head back "pretty hard" into her head "[t]o get her off" of him three or four times. Defendant and Davis fell face first on the floor, and there was a tussle to get up. Defendant testified that the whole episode lasted about two minutes. Afterwards, he said they both calmed down and went out onto the porch to smoke a cigarette together. Defendant denied biting Davis on the nose or the ear but acknowledged that his head hit her in the nose. He denied beating Davis for two hours in the trailer and for two hours on the ride home. He also testified that he did not know what happened to her phone.

¶ 14 Defendant testified that it was Davis's idea to go home that night. Defendant got his daughter and put her in the car seat in the back seat of the car while Davis was in the driver's seat warming up the car. According to defendant, Davis drove the whole way home and they just listened to the radio. When they arrived at the house in Sims, defendant put his daughter in bed and defendant and Davis went to sleep in the same bed. Defendant testified that the next morning Davis's sister came over and was "screaming and hollering." Defendant put his daughter in his car and drove to his parents' house.

¶ 15 On 1 August 2016, defendant was arrested. The defendant went to trial on the following five bills of information in which he was charged with the following seven offenses:

16CRS53232	First-degree kidnapping
16CRS53233	1 – Assault by strangulation 2 – Assault with a deadly weapon inflicting serious injury through fists and hands resulting in a ruptured eardrum
16CRS53234	Assault on a female through a kick to the head
16CRS53235	Assault on a female through a headbutt to the forehead
16CRS53236	1 – Assault with a deadly weapon inflicting serious injury through fists, hands, and teeth resulting in a fractured nose 2 – Communicating threats

The trial began 5 February 2018, and the jury convicted defendant on all charges except two: the assault by strangulation, and assault on a female by kick to the chest. The trial court entered a consolidated judgment in sentencing defendant to a minimum of 75 months and a maximum of 102 months in prison. Defendant appealed to the Court of Appeals.

¶ 16 The Court of Appeals found no error. Defendant filed a petition for discretionary review, which we allowed on 12 August 2020.

II. Issues Presented for Review

¶ 17 On discretionary review, defendant raises two issues: (1) whether there was insufficient evidence of multiple assaults such that the trial court erred by denying defendant's motion to dismiss all but one assault charge; and (2) whether there was sufficient evidence to establish that defendant used his hands, feet, or teeth as deadly weapons. As to the second issue, the members of the Court are equally divided. Accordingly, the decision of the Court of Appeals as to this issue stands as law of this case without precedential value and we spend the remainder of this opinion discussing only the first issue presented. *See*, *e.g.*, *Piro v. McKeever*, 369 N.C. 291, 291 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote); *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 56 (2016) (same).

III. Preservation

¶ 18 Defendant moved to dismiss the deadly weapon element of his assault charges at the close of the State's evidence arguing that insufficient evidence was presented to show that his hands could be considered deadly weapons. He renewed his motion at the close of all of the evidence, mentioning that the bills of information did not include the correct dates of the offense. The Court of Appeals held that defendant's failure to argue before the trial court that the evidence established only one assault resulted in a failure to preserve this argument for appellate review. *State v. Dew*, 270 N.C. App. 458, 462 (2020). We disagree.

¶ 19 We recently held in *State v. Golder*, 374 N.C. 238 (2020), that "merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *Id.* at 249. Additionally, in his petition for discretionary review, defendant requested review of the following issue: "[w]hether the Court of Appeals erred by affirming multiple counts of assault where the defendant struck multiple blows, causing multiple injuries, in a single episode." Defendant's motion to dismiss for insufficient evidence preserved all sufficiency issues, and we allowed defendant's petition for

discretionary review. Accordingly, the issue of whether the trial court erred by failing to dismiss all but one count of assault is properly before us for consideration.

IV. Standard of Review

¶ 20 It is well established that

> [w]hen ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented substantial evidence of each essential element of the crime. Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In making its decision, the trial court must view the evidence in the light most favorable to the State.

State v. Bell, 359 N.C. 1, 25 (2004) (cleaned up) (first quoting *State v. Call*, 349 N.C. 382, 417 (1998); then quoting *State v. Williams*, 355 N.C. 501, 579 (2002), *cert. denied*, 537 U.S. 1125 (2003); and then quoting *State v. Hyatt*, 355 N.C. 642, 666 (2002), *cert. denied*, 537 U.S. 1133 (2003)).

V. Analysis

¶ 21 Here, defendant was charged with seven offenses, including five assault charges, and the jury found him guilty of three assault charges, to wit: AWDWISI (No. 53233) with hands/fists resulting in a ruptured eardrum, assault on a female (No. 53233) headbutt to forehead, and AWDWISI (No. 53236) with hands/fists resulting in a fractured nose. The three assault charges for which defendant was found guilty were assault with a deadly weapon inflicting serious injury resulting in the ruptured eardrum, assault on a female in connection with the headbutt to the forehead, and assault with a deadly weapon inflicting serious injury resulting in the fractured nose. Accordingly, we must now examine whether, in the light most favorable to the State, there was substantial evidence of each essential element of each of these instances of assault on a female or assault inflicting serious injury.[1]

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1. As noted above, the members of this Court are equally divided as to whether there was substantial evidence that defendant's hands, feet, and teeth were used as deadly weapons. Accordingly, we affirm without precedential value the holding of the Court of Appeals that the trial court did not err by denying defendant's motion to dismiss the deadly weapon element of these two counts of assault because the State had presented sufficient evidence that defendant's hands, feet, and teeth were used as deadly weapons. Our analysis of the assault with a deadly weapon inflicting serious injury charges would also be applicable to an analysis of the lesser included offense of assault inflicting serious injury. Therefore, this opinion should not be construed to say conclusively one way or the other whether hands, feet, and teeth are deadly weapons.

¶ 22 One of the essential elements of both assault on a female and assault with a deadly weapon inflicting serious injury is "an assault." *See* N.C.G.S. § 14-33(c)(2) (2019); N.C.G.S. § 14-32(b) (2019).[2] Here we are asked to determine what exactly constitutes an assault and how a court may determine whether there is substantial evidence of multiple assaults or only a single assault.

¶ 23 "Although our statutes criminalize the act of assault, '[t]here is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules.' " *State v. Floyd*, 369 N.C. 329, 335 (2016) (alteration in original) (citation omitted) (quoting *State v. Roberts*, 270 N.C. 655, 658 (1967)). "This Court generally defines the common law offense of assault as 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.' " *Roberts*, 270 N.C. at 658 (quoting 1 Strong's North Carolina Index, *Assault and Battery* § 4 (1957)). Black's Law Dictionary defines "assault" as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact" and "[p]opularly, any attack." *Assault*, Black's Law Dictionary (11th ed. 2019). From these definitions, we gather that assault is a broad concept that can include more than one contact with another person. For example, an "attack" or "show of force" may refer to a single punch but could also refer to a deluge of punches in a single fight and still be called a single assault. We have not found, and the parties have not presented, any evidence or indication that the General Assembly intended for the State to be able to charge someone with a separate assault for every punch thrown in a fight. Indeed, the State made clear in its argument that it did not think it would be appropriate to charge someone for every punch in a fight. Thus, we must look beyond the number of physical contacts with the victim to determine whether

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2. We note that the bills of information indicate that defendant was charged under N.C.G.S. § 14-32(a), which provides that "[a]ny person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon." However, the bills of information classify the offense as a Class E felony and do not include the language of intent to kill. Therefore, it may be that defendant was actually charged under N.C.G.S. § 14-32(b), which provides that "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."

Because our focus is on the first element of the offense, "assault" it makes no difference to our analysis whether defendant was charged under N.C.G.S. § 14-32(a) or N.C.G.S. § 14-32(b). Furthermore, neither party raised this potential discrepancy as an issue at any stage of the litigation.

more than one assault has occurred such that the State can appropriately charge a defendant with multiple assaults.

¶ 24 The question of how to delineate between assaults—to know where one assault ends and another begins—in order to determine whether the State may charge a defendant with multiple assaults, is an issue of first impression in our Court. The Court of Appeals has analyzed this issue several times. *See*, *e.g.*, *State v. Brooks*, 138 N.C. App. 185, 190–91 (2000) (holding that the defendant could only be charged with a single count of assault with a deadly weapon inflicting serious injury where there was no evidence of a distinct interruption between three gunshots); *State v. Littlejohn*, 158 N.C. App. 628, 636 (2003) (holding that the defendant could be charged with two counts of assault where the evidence tended to establish that the assaults were distinct in time and inflicted wounds in different parts of the victim's body); *State v. McCoy*, 174 N.C. App. 105 (2005) (holding that the defendant could be charged with two counts of assault where the evidence showed the assaults took place on two different days, but could not be charged with multiple counts of assault arising from a single continuous transaction on one of those days). In brief, the Court of Appeals has required that "[i]n order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish 'a distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first." *Littlejohn*, 158 N.C. App. at 635 (second alteration in original) (quoting *Brooks*, 138 N.C. App. at 189). But it is not always easy to determine when a "distinct interruption" has occurred.

¶ 25 In some cases, the Court of Appeals has chosen to apply our decision in *State v. Rambert*, 341 N.C. 173 (1995). In *Rambert*, the defendant was charged and convicted of three counts of discharging a firearm into occupied property. *Id.* at 174. The defendant argued on appeal that evidence that he fired three shots into occupied property within a short period of time supported only a single conviction and sentence, not three, for discharging a firearm into occupied property. *Id.* We concluded that "the evidence clearly show[ed] that [the] defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts." *Id.* at 176. We noted that (1) the defendant employed his thought processes each time he fired the weapon, (2) each act was distinct in time, and (3) each bullet hit the vehicle in a different place. *Id.* at 177. Accordingly, we determined that each time the defendant discharged his firearm could be charged as a separate offense. *Id.*

¶ 26 Here, the Court of Appeals applied the three factors from *Rambert* to determine whether there was a distinct interruption between assaults. *Dew*, 270 N.C. App. at 462–63. The State argues that we should likewise apply the *Rambert* factors and conclude that multiple assaults occurred on the night in question. Although we appreciate that *Rambert* may be the most closely analogous case from our Court to date, we decline to extend *Rambert* to assault cases generally. *Rambert* resolved an issue involving the discharge of a firearm, an act which differs from the physical assaults here in important ways. Discharging a firearm means firing a shot; each distinctly fired shot is a separate discharge of a firearm. The same is not true of assault which, as explained above, might refer to a single harmful contact or several harmful contacts within a single incident. Multiple contacts can still be considered a single assault, even though each punch or kick would require a different thought process, would not occur simultaneously, and would land in different places on the victim's body. These two distinct crimes require two distinct analyses. Accordingly, we conclude that the *Rambert* factors are not the ideal analogy for an assault analysis.

¶ 27 We agree with the Court of Appeals that the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults. Building on the Court of Appeals' jurisprudence, we now take the opportunity to provide examples but not an exclusive list to further explain what can qualify as a distinct interruption: a distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.

¶ 28 Based on the facts here, we think it is important to further explain what does *not* constitute a distinct interruption. The State's charges here seem to be based on the victim's injuries. But the fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption such that a defendant can be charged with multiple counts of assault. The magnitude of the harm done to the victim can be taken into account during sentencing but does not automatically permit the State to stack charges against a defendant without evidence of a distinct interruption.

¶ 29 Evidence that a defendant used different methods of attack can show a distinct interruption depending on the totality of the circumstances. Here the State has argued that defendant punched and headbutted the victim and that because there was no evidence that these different

methods of attack occurred at the exact same time, each method constituted a separate assault. We disagree. As we explained above, the concept of an assault can be broader than each individual harmful contact, but allowing for a separate charge for each non-simultaneous contact would erase any limiting principle and allow the State to charge a defendant for every punch in a fight. Requiring the State's case to include evidence of a "distinct interruption" in an otherwise continuous assault addresses this concern.

¶ 30 The State has tried to justify its analysis by noting that neither defendant in this case nor any of the defendants in cases cited by the parties in their briefs were charged for every blow during their assaults. However, this argument would put the limiting principle fully within the discretion of the State. Regardless of the fact that the State did not charge a defendant for each blow, the State's argument would leave open the door such that the State *could* charge for each blow. We decline to leave such ambiguity in the law such that the State could, but may choose not to, charge a defendant for every punch thrown in a fight when the legislature has shown no intention to criminalize the conduct at that level of granularity. To do so would be to abdicate our responsibility to interpret the laws passed by the legislature in accordance with their plain meaning and intention. Furthermore, it would abolish any limiting principle and would leave a trial court powerless to determine whether there was sufficient evidence of multiple assaults since evidence of each punch could constitute a separate assault under the State's proposed legal schema.

¶ 31 We now turn to the facts of this case to determine whether there was substantial evidence of more than one assault. In the light most favorable to the State, we conclude that there could be sufficient evidence of a distinct interruption between assault(s) in the trailer and the assault(s) in the car to submit the issue to the jury.

¶ 32 Davis testified to being beaten for approximately four hours total. She testified that in the trailer defendant hit her "over and over" during a continuous, non-stop beating for at least two hours until she vomited. She also testified that she was beaten during the two-hour car ride home to Sims when defendant hit her on the side of her head and pulled off the road several times to strangle her. But Davis also indicated that there was a distinct interruption between the attack in the trailer and the attack in the car.

¶ 33 After the beating in the trailer, but before defendant began beating Davis in the car, Davis testified that she wiped down the mattress cover and took the sheets off of the bed, that she took their luggage out to the

car, and that defendant got his daughter off of the couch and put her in a car seat in the back seat of the car. This is substantial evidence of a distinct interruption between occurrences in the trailer and those in the car. The process of cleaning up and packing up was an intervening event interrupting the momentum of the attack. In addition, the beating in the trailer was distinct in time and location from the beating in the car. The jury could have found that there was a distinct interruption between when the first assault concluded with Davis vomiting on the bed and when defendant resumed his attacks in the car during the drive home.

¶ 34 Defendant draws inferences from Davis's testimony that the entirety of the assault took place in the trailer. But in the light most favorable to the State, the following testimony is substantial evidence that defendant also assaulted Davis in the car:

> We continued on, and as we were on the way home, the whole time he is still hitting me upside this side of my head where I had the ruptured eardrum. He—I remember him pulling off the road, jacking me up to the ceiling of the car, strangling me. There were several times—his arms are long, so he could reach over in my car—he would make me take my seat belt off, open the door and tell me he was going to push me out.
>
> He pulled off the road several times and continued to do that. I think it was about three times with the seat belt and he's going to push me out of the car.

Accordingly, we conclude that the jury could find that the beating in the trailer and the beating in the car were distinct assaults.

¶ 35 The State charged defendant with at least two assaults for his conduct in the trailer: assault on a female involving the headbutt to the forehead and assault with a deadly weapon inflicting serious injury resulting in the fractured nose. As noted above, different injuries or different methods of attack standing alone are insufficient evidence of a distinct interruption. The State presented no evidence indicating that a distinct interruption occurred in the trailer. Even in the light most favorable to the State, all of the evidence indicated that it was an ongoing, continuous attack. Accordingly, there is substantial evidence of only one assault in the trailer. On remand, the trial court should vacate the judgment for the assault on a female (No. 16CR55325, involving the headbutt to the forehead), and enter a new sentence for the remaining consolidated offenses.

VI. Conclusion

¶ 36 The trial court did not err by denying defendant's motion to dismiss all but one of the assault charges because, in the light most favorable to the State, there was sufficient evidence of two assaults—one in the trailer and one in the car—to go to the jury. The evidence was not sufficient to show two assaults in the trailer as there was no showing of a distinct interruption in what was described as a non-stop, several hour attack in the trailer. Accordingly, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED; REMANDED FOR RESENTENCING.

Justice BERGER did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA
v.
JOHN D. GRAHAM

No. 155PA20

Filed 29 October 2021

Sentencing—prior record level calculation—parallel offense from another state—comparison of elements—substantially similar

For purposes of calculating defendant's prior record level calculation (after he was convicted of sexual offense with a child by an adult), defendant's conviction of statutory rape in Georgia was properly deemed to be equivalent to a North Carolina Class B1 felony where the statutory rape statutes in both states were substantially similar, despite variations in the age of the victim and the age differential between the perpetrator and victim. In applying the "comparison of the elements" test to determine whether an out-of-state criminal statute is substantially similar to a North Carolina criminal statute (pursuant to N.C.G.S. § 15A-1340.14(e)), there is no requirement that the statutes use identical language or that all conduct prohibited by one statute must also be prohibited by the other.

Justice EARLS dissenting.

Justice ERVIN joins in this dissenting opinion.

Discretionary review allowed pursuant to N.C.G.S. § 7A-31 concerning the opinion of a divided panel of the Court of Appeals, 270 N.C. App. 478 (2020), finding no error in part and vacating and remanding in part an order entered on 13 December 2016 by Judge Eric Levinson in Superior Court, Clay County[1] and an order entered on 13 May 2019 by Judge Athena F. Brooks in Superior Court, Clay County. Heard in the Supreme Court on 26 April 2021.

Joshua H. Stein, Attorney General, by Benjamin O. Zellinger, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Daniel Shatz, Assistant Appellate Defender, for defendant-appellant.

MORGAN, Justice.

¶ 1 This Court has limited its allowance of defendant's petition for discretionary review to a single issue addressed by the Court of Appeals which defendant contends that the lower appellate court decided in error. Pertinent to our election to review this case is defendant's argument that the Court of Appeals either improperly applied or disregarded the appropriate test for determining whether a defendant's out-of-state conviction may be counted as an elevated felony classification for purposes of sentencing in North Carolina trial courts as announced in *State v. Sanders*, 367 N.C. 716 (2014). Because we believe that the Court of Appeals majority, with which the lower appellate court's dissenting opinion agreed, properly applied the comparative elements test in affirming the trial court's consideration of defendant's conviction in the state of Georgia for statutory rape as equivalent to a North Carolina Class B1 felony for the purpose of the calculation of prior record level points in criminal sentencing, we affirm the Court of Appeals determination and find no error.

I. Factual and Procedural Background

¶ 2 Defendant was indicted on four counts each of sexual offense with a child by an adult and taking indecent liberties with a child by a Clay

1. The Court of Appeals judge who rendered an opinion "concurring in part and dissenting in part" did not disagree with the lower appellate court's majority opinion concerning the subject of our opinion here. *See State v. Graham*, 270 N.C. App. 478, 502 (2020) (Bryant, J., concurring in part and dissenting in part). As a result, this Court afforded discretionary review to the issue addressed herein so as to be able to consider it.

County grand jury on 11 September 2012. Defendant's trial began on 5 December 2016. The victim in the case, A.M.D.,[2] testified that on multiple occasions when she was seven to eight years old, defendant inappropriately touched her private areas and digitally penetrated her vagina. At the close of the State's evidence, the State voluntarily dismissed all four counts of taking indecent liberties with a child, and the trial court submitted the remaining four counts of sexual offense with a child by an adult to the jury after both parties had ended their respective presentations. On 9 December 2016, the jury returned a verdict of guilty on one count of sexual offense with a child by an adult, and found defendant not guilty as to the three remaining charges. The trial court continued sentencing until the following week.

¶ 3 At the sentencing hearing on 13 December 2016, the State tendered to the trial court defendant's conviction on 21 March 2001 for statutory rape in Georgia,[3] as well as defendant's more recent conviction on 9 April 2015 for escaping a local jail in Clay County, for consideration by the trial court in its calculation of defendant's prior record level. In compliance with the regular procedure for trial courts in North Carolina, the trial court in this case utilized a standardized AOC-CR-600B form to determine, under a structured sentencing statutory framework, the manner in which defendant's prior convictions would affect the length of active time that defendant would serve for his single Class B1 felony conviction in violation of North Carolina law for the commission of sexual offense with a child by an adult. The trial court treated defendant's Georgia statutory rape conviction as a Class B1 felony—which garnered defendant nine prior record points for sentencing purposes—because the trial court regarded the Georgia statute under which defendant was convicted as similar to North Carolina's own statutory rape statute. In the event that the trial court had classified defendant's Georgia conviction in the lower felony class level of Class I, which was an option available to the trial court, then defendant would have been assigned only two prior record points for the Georgia conviction as the trial court determined defendant's sentence for his perpetration of the North Carolina criminal offense of sexual offense with a child by an adult. Combined with

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2. The juvenile victim's initials are used to obscure her identity in an effort to protect the victim's privacy.

3. The record reflects that the victim in defendant's 2001 conviction for statutory rape in Georgia was the mother of A.M.D. It appears that after defendant was released from the active term that he was serving for the Georgia conviction, defendant absconded probation with the assistance of A.M.D.'s mother, and was invited by A.M.D.'s mother to reside with her and A.M.D.

one point assigned for defendant's previous escape conviction, defendant was assigned a total of ten prior record level points for sentencing purposes, which automatically categorized him as a Level IV offender for sentencing determinations. On the other hand, if the trial court had declined to find substantial similarity between the Georgia and North Carolina statutes at issue, then defendant would have received a total of only three prior record level points which would have classified him as a prior record Level II offender under North Carolina's structured sentencing guidelines. In sentencing defendant within the parameters of prior record Level IV, the trial court entered a judgment of 335 to 462 months of active time of incarceration for defendant. Defendant appealed, and the Court of Appeals panel held that the trial court did not err as to finding substantial similarity between the Georgia and North Carolina statutes.

II. Analysis

¶ 4 On 21 March 2001, defendant was found guilty of the offense of statutory rape in the state of Georgia. He was determined to have violated section 16-6-3 of the Official Code of Georgia Annotated, which read as follows at the time of defendant's conviction under the Georgia statute:

> (a) A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.
>
> (b) A person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor.

Ga. Code Ann. § 16-6-3 (2001). Expanded into its component parts, the Georgia statute results in a felony conviction if a defendant (1) engages in sexual intercourse (2) with any person (3) under sixteen years of age (4) who is not the defendant's spouse, (5) unless the victim is fourteen or fifteen years of age and the defendant is no more than three years

older than the victim.[4] Ga. Code Ann. § 16-6-3. If the victim is fourteen or fifteen years old and the defendant is within three years in age of the victim, then the defendant is guilty of a misdemeanor. *Id.*

¶ 5 Comparably, section 14-27.25 of the General Statutes of North Carolina stated the following at the time that the trial court in defendant's matter at issue conducted the sentencing hearing in the present case on 13 December 2016:

> (a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person.
>
> (b) Unless the conduct is covered under some other provision of law providing greater punishment, a defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and more than four but less than six years older than the person, except when the defendant is lawfully married to the person.

N.C.G.S. § 14-27.25 (2015). The elements of the North Carolina statute require the State to prove that a defendant (1) engaged in vaginal intercourse (2) with another person (3) fifteen years of age or younger (4) who is not the defendant's spouse, (5) provided that the defendant is at least twelve years of age at the time of the offense and (6) at least six years older than the victim to constitute a Class B1 violation of N.C.G.S. § 14-27.25(a), and less than six years older but more than four years older than the victim to constitute a Class C violation of N.C.G.S. § 14-27.25(b). N.C.G.S. § 14-27.25.

¶ 6 In calculating a defendant's prior record level, a trial court must determine whether the statute under which a defendant was convicted in another state is substantially similar to a statute of a particular felony in North Carolina, which the State must show by a preponderance of the evidence. Subsection 15A-1340.14(e) states in pertinent part:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than

4. In the case at bar, defendant's Georgia conviction was a felony offense.

> North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . . *If the State proves by the preponderance of the evidence that an offense classified as . . . a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.*

N.C.G.S. § 15A-1340.14(e) (2019) (emphasis added).

¶ 7 We adopt the correctness of determinations made by the Court of Appeals that "whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law," *State v. Hanton*, 175 N.C. App. 250, 254 (2006), and "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar,' " *State v. Sapp*, 190 N.C. App. 698, 713 (2008). "We review questions of law de novo." *State v. Khan*, 366 N.C. 448, 453 (2013).

¶ 8 In the instant case, the trial court evaluated defendant's conviction of statutory rape in the state of Georgia to be commensurate with a Class B1 felony in North Carolina for sentencing purposes in the present case and hence, in assigning points for prior convictions, accorded nine points to the Georgia conviction. We agree with the determination of the lower appellate court, to which defendant appealed the trial court outcomes, "that the trial court did not err in finding the two offenses substantially similar" as Ga. Code Ann. § 16-6-3 outlaws statutory rape of a person who is under the age of sixteen and N.C.G.S. § 14-27.25 prohibits statutory rape of a person who is fifteen years of age or younger.[5] *State v. Graham*, 270 N.C. App. 478, 496 (2020).

¶ 9 Each of the statutes includes an express reference to the act of physical intercourse between the perpetrator of the offense and the victim; Georgia utilizes the phrase "engages in sexual intercourse" and North

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5. While the Court of Appeals recognized that "the State failed to meet its burden of proof" due to the State's failure to introduce a copy of the Georgia statute into evidence despite the provision of the foreign enactment to the trial court for review, nonetheless the lower appellate court determined that this omission constituted harmless error because "the record contains enough information for us to review the trial court's determination that the Georgia and North Carolina offenses were substantially similar." *Graham*, 270 N.C. App. at 491–92. Defendant does not challenge this determination by the Court of Appeals in the current appeal to us.

Carolina employs the terminology "engages in vaginal intercourse." Both statutes employ nearly identical language that the act of physical intercourse is conducted by the perpetrator with another person and that the other person is not the offender's spouse by virtue of a lawful marriage. The variations between the two statutes arise in the areas of the age of the statutory rape victim—Georgia, "under the age of 16 years," and North Carolina, "15 years of age or younger"—and the age difference between the two participants which impacts the perpetrator's degree of punishment—Georgia, "[a] person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor," Ga. Code Ann. § 16-6-3, and North Carolina, "[a] defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person . . . [and] a defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years older and more than four but less than six years older than the person," N.C.G.S. § 14-27.25.

¶ 10 Defendant argues that the Georgia statutory rape statute and the North Carolina statutory rape statute are not substantially similar in addressing the criminal offenses which they respectively prohibit in that there is no age difference element in the Georgia law, because unlike the North Carolina law which identifies specific age differences in its felony classifications, defendant notes that "the Georgia statute applies equally to all persons under the age of 16 years." He expounds upon this "lack of an age difference element in the Georgia statutory rape statute" by offering hypothetical examples of sexual intercourse which he posits would constitute the offense of statutory rape in Georgia but would not constitute the offense of statutory rape in North Carolina. Defendant submits that in a comparison of a North Carolina statute with another state's statute in order to determine substantial similarity between the two, if the difference between the two statutes renders the other state's law narrower or broader, "or if there are differences that work in both directions, so that each statute includes conduct not covered by the other, then the two statutes will not be substantially similar for purposes of the statute." Additionally, defendant asserts that the Georgia law under

examination here is not substantially similar to the North Carolina enactment to which it is being paralleled because the Georgia law can be violated "by conduct that is only a Class C felony . . . in North Carolina." Defendant's arguments are unpersuasive.

¶ 11 Defendant's position conflates the requirement that statutes subject to comparison be substantially similar to one another with his erroneous perception that the two statutes must have identicalness to each other. As we previously noted in our recognition of *Sapp*, 190 N.C. App. at 713, the statutory wording of the Georgia provision and the North Carolina provision do not need to precisely match in order to be deemed to be substantially similar. Likewise, defendant's stance that the Georgia statute and the North Carolina statute cannot be considered to be substantially similar because not every violation of the Georgia law would be tantamount to the commission of a Class B1 felony under the comparative North Carolina law is unfounded. In applying N.C.G.S. § 15A-1340.14(e) to the case sub judice, since the Georgia offense of statutory rape "is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher"—here, a Class B1 felony under N.C.G.S. § 14-27.25(a)—then defendant's conviction of statutory rape in the state of Georgia is treated as a Class B1 felony conviction for the assignment of the appropriate number of prior record level points. Accordingly, the trial court in the instant case correctly ascertained the figure of nine points for felony sentencing purposes for defendant's commission of the Georgia offense of statutory rape for which defendant was convicted on 21 March 2001.

¶ 12 The dissent's view suffers from the same foundational flaw that is exhibited by defendant's stance on the pivotal resolution of the question as to whether the statutes at issue are substantially similar to one another. Although our learned colleagues who would reach a different outcome in this case join defendant in confusing the legal concept of "substantially similar" with the aspect of identicalness, the dissenters further compound their unfortunate jumble of the two different measures by expanding the scope of "substantially similar" toward a requirement of exactitude. Standing alone, neither word—"substantially" or "similar"—connotes literalness; therefore, when these words are combined to create the legal term of art "substantially similar," this chosen phraseology reinforces the lack of a requirement for the statutory language in one enactment to be the same as the statutory language in another enactment in order for the two laws to be treated as "substantially similar." Yet, the dissent here—despite the obvious essential pertinent parallels between the Georgia statute and the North Carolina statute—

would withhold a recognition that the two statutes are substantially similar because all of the same provisions are not common to each of them. In this respect, although the dissent professes that it understands the difference between "substantially similar" and identicalness, nonetheless it appears that the dissent is so ensnared and engulfed by a need to see a mirrored reflection mutually cast between the two statutes that the dissent is compelled to promote this erroneously expansive approach.

¶ 13 With our agreement with the view of the Court of Appeals that the trial court did not err in finding that the two offenses which the Georgia statute and the North Carolina statute respectively proscribed were substantially similar, this outcome comports with our decision in *Sanders*, 367 N.C. 716. In *Sanders*, this Court reviewed the criminal offense of the state of Tennessee known as "domestic assault" and the North Carolina offense of assault on a female. The *Sanders* defendant was found by a jury to be guilty of robbery with a dangerous weapon, and the trial court examined the defendant's prior convictions during the trial's sentencing phase for the purpose of establishing the defendant's sentencing points. His prior convictions included the Tennessee offense of domestic assault.

¶ 14 We noted in *Sanders* that the Court previously "ha[d] not addressed the comparison of out-of-state offenses with North Carolina offenses for purposes of determining substantial similarity under N.C.G.S. § 15A-1340.14(e)." 367 N.C. at 718. In this case of first impression, this Court held that "[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *Id.* at 720 (alteration in original) (quoting *State v. Fortney*, 201 N.C. App. 662, 671 (2010)). In devising a "comparison of the elements" test, this Court expressly rejected the State's argument in *Sanders* "to look beyond the elements of the offenses and consider (1) the underlying facts of defendant's out-of-state conviction, and (2) whether, considering the legislative purpose of the respective statutes defining the offenses, the North Carolina offense is 'suitably equivalent' to the out-of-state offense." *Id.* at 719. The Court's implementation of its announced "comparison of the elements" test compelled us to determine that the Tennessee offense of domestic assault and the North Carolina offense of assault on a female were not substantially similar, in that the disparity in the elements of the two offenses regarding the genders of the parties involved and the status of their relationships rendered the Tennessee and North Carolina offenses legally incomparable to one another for purposes of the determination of prior record level points. *Id.* at 721.

¶ 15 In attempting to equate the statutes at issue in *Sanders* with the statutes being evaluated in the present case, the dissent demonstrates its misunderstanding of the application of *Sanders* and its misinterpretation of the term "substantially similar." The dissent sees no meaningful difference, for purposes of the determination of "substantially similar" statutes, between 1) a one-year difference in the age of early teenagers who are victims and 2) specified age difference delineations between victims and offenders in the instant case, and 1) a total elimination of one gender from the ability to offend and 2) the relationship status of victims and offenders in *Sanders*. In fixating on the exactness of the terminology of the respective statutes being compared in each of the two cases and corresponding potential outcomes which might be yielded in specific fact pattern scenarios which could arise in each state, the dissent promotes a widened view of "substantially similar" which would wrongly extend this Court's holding in *Sanders* to require identicalness between compared statutes from different states and mandate identical outcomes between cases which originate both in North Carolina and in the foreign state. Such requirements would be inconsistent with our analysis in *Sanders*, the cited principles which we utilize from the Court of Appeals cases of *Hanton* and *Sapp*, and the proper construction and application of the concept of "substantially similar."

¶ 16 Despite the dissent's concerns, we understand that it is unwise to endeavor to articulate a "bright-line rule" to govern a determination of whether a North Carolina statute is "substantially similar" to a statute from another state. While the dissent would establish such a standard with a test of identicalness, this guide is erroneous as well as incompatible with the concept of the identification of whether enactments of law are "substantially similar." There are so many iterations of so many similar laws written in so many different ways, in North Carolina and in the forty-nine other states in America, that the courts of this state must necessarily possess the ability to operate with the flexibility that the phrase "substantially similar" inherently signifies in determining whether statutes which are being compared share the operative elements in the evaluation. While such an exercise is predictably challenging, we are confident that the courts of this state have sufficient guidance and flexibility to properly conduct the prescribed analysis of the statutes' respective elements.

¶ 17 In applying the "comparison of the elements" test articulated in *Sanders* to the present case, the harmonious determinations of the trial court and the Court of Appeals here are consistent with our view that the Georgia statutory rape offense prohibited by Ga. Code Ann. § 16-6-3

and the North Carolina statutory rape offense forbidden by N.C.G.S. § 14-27.25(a) are substantially similar. Just as the State in *Sanders* was unsuccessful in its assertion that a court's determination of whether two statutes are "substantially similar" should be premised on considerations other than the statute's elements, defendant is unsuccessful here in his argument that is contrary to the cited statutory and case law, while being incongruous with the "comparison of the elements" test which supports the conclusion that the Georgia and North Carolina offenses at issue are substantially similar for purposes of the computation of defendant's prior record level points for sentencing.

III. Conclusion

¶ 18 The Georgia statutory rape statute under which defendant was previously convicted was substantially similar to North Carolina's statutory rape statute so as to authorize the trial court to regard defendant's conviction of the offense of statutory rape in the state of Georgia as a Class B1 felony offense for purposes of determining defendant's prior record level points for sentencing purposes. The trial court did not err in this determination, and the Court of Appeals was correct in its subsequent determination to affirm the trial court on this sole issue which we have addressed upon discretionary review.

AFFIRMED.

Justice EARLS dissenting.

¶ 19 An out-of-state statute is not "substantially similar" to a North Carolina statute within the meaning of N.C.G.S. § 15A-1340.14(e) if conduct that is proscribed by the out-of-state statute is lawful under the North Carolina statute. That was the substance of the elements-based approach to comparing criminal statutes we articulated in *State v. Sanders*, 367 N.C. 716 (2014). Despite its protestations to the contrary, the majority does not adhere to *Sanders*. The resulting decision fails to "giv[e] fair and clear warning" to the public of the consequences of engaging in criminal conduct, *United States v. Lanier*, 520 U.S. 259, 271 (1997), and construes N.C.G.S. § 15A-1340.14(e) in a way that likely "fail[s] to meet constitutional standards for definiteness and clarity," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). Because the majority's analysis will not yield an "evenhanded, predictable, or consistent" application of N.C.G.S. § 15A-1340.14(e), *Johnson v. United States*, 576 U.S. 591, 606 (2015), I respectfully dissent.

I. The majority's decision is in tension with *Sanders*

¶ 20 In this case, the Georgia statute that the defendant, John D. Graham, violated is not "substantially similar" to any Class B1 felony provided by North Carolina law. This conclusion necessarily follows from any fair reading of *Sanders*.

¶ 21 In *Sanders*, this Court considered whether a Tennessee statute prohibiting individuals from assaulting any "domestic abuse victim," Tenn. Code Ann. § 39-13-111(b) (2009), was "substantially similar" to the North Carolina statutory offense of assaulting a female, N.C.G.S. § 14-33(c)(2) (2013). We held that it was not. Our reasoning was straightforward. Under the Tennessee statute, an individual was guilty of the specified offense if the person assaulted someone who fell within one of six defined categories of "domestic abuse victims." None of these categories contained the requirement found in N.C.G.S. § 14-33(c)(2) that "the victim . . . be female [and] the assailant . . . be male and of a certain age." *Sanders*, 367 N.C. at 720. Thus,

> a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee.

Id. at 721. This Court unanimously agreed that because the defendant could have been convicted under the Tennessee statute for conduct that would not have been criminal under the North Carolina statute, the two statutes were not "substantially similar." *Id.*

¶ 22 *Sanders* yielded two principles which should dictate the outcome of this case. The first principle is that "[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *Id.* at 720 (alteration in original) (quoting *State v. Fortney*, 201 N.C. App. 662, 671 (2010)). Accordingly, when ascertaining whether two statutes are substantially similar, we look only to the statutory elements of the offense, not to the factual underpinnings of the defendant's convictions.

¶ 23 The second principle is that an out-of-state criminal statute is not substantially similar to a North Carolina criminal statute if a defendant could be convicted under the out-of-state statute for acts which would

not be criminal (or not criminal at the same offense level) if committed in North Carolina. Adherence to this principle is necessary to faithfully implement the elements-based approach. When all of the conduct targeted by an out-of-state statute is encompassed within the North Carolina statute it is being compared to, there is no doubt that the defendant has committed an offense which would garner the same number of prior record level points had the defendant engaged in the proscribed conduct in North Carolina. A defendant who previously committed an act giving rise to an out-of-state criminal conviction will never be sentenced more harshly than a similarly situated defendant who previously committed the exact same act in North Carolina. Further, the facts underlying the defendant's out-of-state conviction are made irrelevant—whatever the defendant did to earn his or her out-of-state conviction, his or her conduct would necessarily violate the North Carolina statute it is being compared to.

¶ 24 The elements-based approach adopted in *Sanders* is not difficult to apply. That is, or was, its primary virtue. In this case, applying *Sanders'* correct interpretation of N.C.G.S. § 15A-1340.14(e) dictates that Graham's prior conviction in Georgia should be treated as a Class I felony for purposes of sentencing. The Georgia statute Graham was convicted under, Ga. Code Ann. § 16-6-3 (2001), indisputably encompasses conduct which is not a Class B1 felony in North Carolina. If an eighteen-year-old individual has sexual intercourse with a fourteen-year-old in Georgia, that person has violated Ga. Code Ann. § 16-6-3. If an eighteen-year-old individual has sexual intercourse with a fourteen-year-old in North Carolina, that person has not violated any statute creating a Class B1 felony offense in this state that existed at the time Mr. Graham was convicted of his offense in Georgia. *See* N.C.G.S. § 14-27.7A(a) (2001) (making it a Class B1 felony "if . . . defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and . . . defendant is at least six years older than the person"); N.C.G.S. § 14-27.2A(a) (2001) (making it a Class B1 felony "if the [defendant] is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years"); N.C.G.S. § 14-27.2(a) (2001) (making it a Class B1 felony "if the person engages in vaginal intercourse . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim"). Under *Sanders*, we should stop there.

¶ 25 Whatever the majority says it is doing in extending beyond this point, it is not applying *Sanders*. The point of the elements-based approach is not to engage in a subjective, qualitative assessment of the substance of

two criminal offenses. The point is to enable a court to convert an out-of-state offense into an in-state offense for sentencing purposes, without needing to resort to an independent inquiry into the factual circumstances of a defendant's prior out-of-state conviction, and without creating the risk that a defendant who previously engaged in criminal conduct in another state will be sentenced differently than a similarly situated defendant who engaged in the same conduct in North Carolina.

¶ 26 The fact that Ga. Code Ann. § 16-6-3 generally targets the same kind of conduct as some North Carolina Class B1 felony offenses does not make the statute "substantially similar" under N.C.G.S. § 15A-1340.14(e). It is improper to sentence a defendant based upon our own intuition that most of the conduct prohibited by an out-of-state statute would also be prohibited by an analogous North Carolina statute. *Cf. United States v. Davis*, 139 S. Ct. 2319, 2326 (2019) ("[T]he imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.' "). Squinting at two statutes and saying "close enough" is not, in this context, good enough. The majority's freewheeling approach is an invitation to unchecked judicial discretion. As a result, some defendants will inevitably be sentenced as if they had previously committed more serious offenses than they actually committed.

¶ 27 The majority is also wrong to suggest that faithful application of the elements-based approach reflects an "erroneous perception that the two statutes must have identicalness to each other." No one disputes that "substantially similar" does not mean "identical." However, the rule articulated in *Sanders* in no way requires the State to prove that an out-of-state statute is a carbon copy of the North Carolina statute it is being compared to.

¶ 28 Two criminal statutes may contain the same elements yet utilize different statutory language or be structured in different ways. For example, a hypothetical out-of-state statute which makes it a crime to intentionally use physical force to harm or threaten a female person, provided that the perpetrator is a male above the age of majority, would be substantially similar to N.C.G.S. § 14-33(c)(2), which makes it a crime for a "male person at least 18 years of age" to "[a]ssault[ ] a female." The statutes would not be identically worded, but they would be substantially similar because both would require the State to prove the same elements in order to convict a defendant.

¶ 29 Similarly, two criminal statutes may contain different elements but still be substantially similar if all of the conduct proscribed by the

out-of-state statute is proscribed by the North Carolina statute it is being compared to. A hypothetical out-of-state statute which makes it a crime to intentionally use physical force to harm or threaten a female person under the age of 12, provided that the perpetrator is a male at least twenty years old, would be substantially similar to N.C.G.S. § 14-33(c)(2), even though the statutes would not contain exactly the same elements, because anyone convicted under the out-of-state statute would necessarily have engaged in conduct proscribed by N.C.G.S. § 14-33(c)(2). *Sanders* gave full effect to every word the legislature chose to include in N.C.G.S. § 15A-1340.14(e). We should in turn give full effect to a unanimous decision interpreting the statute, rather than depart from its well-reasoned principles.

II. The majority's reasoning creates substantial uncertainty for lower courts and criminal defendants

¶ 30 The majority eschews the elements-based approach we established in *Sanders*, but it is not entirely clear what has been offered as a replacement. As the majority acknowledges, the Georgia and North Carolina statutes at issue in this case vary "in the areas of the age of the statutory rape victim" and in "the age difference between the two participants which impacts the perpetrator's degree of punishment." Further, the majority does not dispute that an individual could engage in conduct which "would constitute the offense of statutory rape in Georgia but would not constitute the offense of statutory rape in North Carolina." Nevertheless, the majority cursorily dismisses Graham's position that the statutes are not substantially similar as "unfounded." According to the majority, the State should prevail here because "[e]ach of the statutes includes an express reference to the act of physical intercourse between the perpetrator of the offense and the victim," and the two statutes "employ nearly identical language that the act of physical intercourse is conducted by the perpetrator with another person and that the other person is not the offender's spouse by virtue of a lawful marriage."

¶ 31 Of course, nearly the same could be said for the statutes at issue in *Sanders*. Both of those statutes criminalized the same kind of violent conduct directed against statutorily defined category of victims. In *Sanders*, we held that two statutes were *not* substantially similar because each targeted conduct directed towards distinct classes of persons—"domestic abuse victims" under the Tennessee statute, "females" under the North Carolina statute. Here, the majority holds that the two statutes *are* substantially similar even though they target conduct directed towards distinct classes of persons—anyone under the age of sixteen who is not the perpetrator's spouse under the Georgia statute,

anyone under the age of fifteen who is not the perpetrator's spouse and who is at least six years younger than the perpetrator under the North Carolina statute. The majority leaves lower courts, criminal defendants, and the public guessing as to why the distinctions we found dispositive in *Sanders* are irrelevant here.

¶ 32 The majority's unwillingness to articulate a clear legal rule, or even a squishier but still bounded multifactor test, is not only in tension with *Sanders*. It also creates a significant risk of rendering N.C.G.S. § 15A-1340.14(e) unconstitutionally vague. Under the majority's interpretation of N.C.G.S. § 15A-1340.14(e), an individual with a prior out-of-state conviction has no real way of knowing how they will be sentenced if they violate a North Carolina statute.[1] If the elements of the out-of-state criminal statute are in any way different than the elements of the North Carolina criminal statute it is being compared to, an individual will be tasked with speculating as to whether the elements are different enough to make the statutes not substantially similar, without any meaningful guidance from this Court. The United States Supreme Court has long held that precisely this kind of uncertainty is inconsistent with due process rights. *See, e.g.*, *United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.").

¶ 33 As a practical matter, the majority's amorphous reasoning will confer upon trial courts increased discretion to determine whether two statutes are or are not substantially similar based solely upon their own judgment. There are some matters which should be left entirely to the discretion of a trial court, but determining how many prior record level points should be assessed for an out-of-state conviction is not one of them. The majority's "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988); *see also Johnson*, 576 U.S. at 602 ("Invoking so shapeless a provision to condemn

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1. The majority claims that holding the two statutes at issue in this case to be not substantially similar would ignore "the obvious essential pertinent parallels" between them. I acknowledge that the two statutes at issue here share some similarities, but the majority's reasoning does not yield any principled way of discerning whether two statutes which share some similarities are or are not substantially similar within the meaning of N.C.G.S. § 15A-1340.14(e). The majority does not explain which elements are "essential" and "pertinent" and which are not, nor does the majority explain how closely the elements must "parallel" each other for two statutes to be substantially similar. Even if the outcome the majority reaches could be justified under N.C.G.S. § 15A-1340.14(e), the reasoning the majority deploys fails to provide necessary guidance to lower courts and future litigants.

someone to prison . . . does not comport with the Constitution's guarantee of due process."). *Sanders* circumscribed this discretion by requiring trial courts to conduct an objective analysis which yielded predictable results. The majority's new approach places N.C.G.S. § 15A-1340.14(e) on much shakier constitutional ground.

¶ 34 What does remain clear after today is that a court is never permitted to engage in an examination of the factual underpinnings of a defendant's out-of-state conviction. As the United States Supreme Court cautioned when it adopted something akin to the elements-based approach in the context of interpreting the Armed Career Criminal Act, 18 U.S.C. § 924, "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor v. United States*, 495 U.S. 575, 601 (1990). Practically, it is unclear what sources a court would be permitted to draw from when attempting to determine whether the facts giving rise to the defendant's out-of-state conviction would have constituted an in-state criminal offense at the same level. In at least some cases—especially those resolved by plea bargain—the factual basis for the defendant's out-of-state conviction might be impossible to surmise. Legally, because the court's inquiry into the factual basis for an out-of-state conviction could lead to enhanced criminal punishment, a defendant's Sixth Amendment rights would necessarily be implicated. *See*, *e.g.*, *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (explaining that a defendant's Sixth Amendment rights are violated if the court imposes an increased sentence based upon "facts supporting [a] finding [that] were neither admitted by [the defendant] nor found by a jury"). Accordingly, although the majority departs from the approach we endorsed in *Sanders* in critical ways, nothing in today's decision gives license to trial courts to sentence criminal defendants based upon ad hoc inquiries into the circumstances of their out-of-state convictions, a practice which would be akin to constitutionally dubious "collateral trials." *Shepard v. United States*, 544 U.S. 13, 23 (2005).

III. The majority's interpretation of the phrase "substantially similar" is in tension with the structure and purpose of N.C.G.S. § 15A-1340.14(e)

¶ 35 At its core, this case involves a question of statutory interpretation: What did the General Assembly intend when it chose the phrase "substantially similar" in N.C.G.S. § 15A-1340.14(e)? The majority contends that the legislature did not intend for courts to treat statutes as substantially similar only when "the statutory wording precisely match[es]." True, but the structure of the provision at issue makes clear that finding two statutes to be "substantially similar" is an exception to the baseline rule,

rather than the expected outcome every time a criminal defendant has a prior out-of-state conviction. Subsection § 15A-1340.14(e) provides that "[*e*]*xcept as otherwise provided in this subsection*, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony." (Emphasis added.) The majority's reasoning threatens to make a finding of substantial similarity the default, in contrast to clear legislative intent. *See, e.g.*, *State v. Hogan*, 234 N.C. App. 218, 228 (2014) ("[I]f the State establishes that the defendant has an out-of-state felony conviction, *it is by default considered a Class I felony* . . . .").

¶ 36 Moreover, it is worth noting that the majority's reasoning cuts both ways: It is often a defendant who has been convicted of an offense categorized as a felony in another state who invokes N.C.G.S. § 15A-1340.14(e) in an effort to prove that the out-of-state felony offense is actually "substantially similar" to a North Carolina misdemeanor. N.C.G.S. § 15A-1340.14(e) ("*If the offender proves by the preponderance of the evidence* that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points." (emphasis added)); *see also Hogan*, 234 N.C. App. at 229 (treating a New Jersey conviction as a Class I felony because the "defendant failed to show that [felony] third degree theft in New Jersey is substantially similar to a North Carolina misdemeanor"). Thus, by removing any reliable and clear standard for a movant to prove that two statutes are substantially similar, the majority's reasoning guarantees both that individuals whose conduct would not be felonious under North Carolina law will more haphazardly be sentenced as if they had committed a felony and that individuals whose conduct would have been felonious under North Carolina law will more haphazardly be sentenced as if they had committed misdemeanors. This outcome stands in stark contrast to the design of a statute plainly intended to ensure that criminal defendants in North Carolina with prior out-of-state convictions are sentenced at parity with criminal defendants in North Carolina with prior in-state convictions.

IV. Conclusion

¶ 37 Our Court does not seek to fashion clear legal rules (solely) because we are lawyers who, by nature and by training, tend to be persnickety. First and foremost, we strive for clarity because the force and legitimacy of law depends in no small part on its comprehensibility and predictability. Ambiguous laws are susceptible to unequal application under

the guise of judicial discretion. The need for certainty is especially pronounced when interpreting statutes imposing criminal sanctions. *See*, *e.g.*, *Clark's Charlotte*, *Inc. v. Hunter*, 261 N.C. 222, 233 (1964) (explaining that a statute may be unconstitutionally vague if it fails to "warn people of the criminal consequences of certain conduct"); *Johnson*, 576 U.S. at 597 (holding a provision of 18 U.S.C. § 924 unconstitutional because it "leaves grave uncertainty about how to estimate the risk posed by a crime"). The majority's decision to trade *Sanders*' clear legal rule for a Delphic muddle disserves these constitutional interests and produces an interpretation of a statute at odds with legislative intent. Therefore, I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MICHAEL EUGENE WRIGHT

No. 408A20

Filed 29 October 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 273 N.C. App. 188, 848 S.E.2d 252 (2020), affirming a judgment entered on 26 April 2019 by Judge Carla Archie in Superior Court, Cleveland County. Heard in the Supreme Court on 31 August 2021.

Joshua H. Stein, *Attorney General*, *by John R. Green Jr.*, *Special Deputy Attorney General*, *for the State-appellee.*

Mary McCullers Reece for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. STRUDWICK

[379 N.C. 94, 2021-NCSC-127]

STATE OF NORTH CAROLINA
v.
TENEDRICK STRUDWICK

No. 334PA19-2

Filed 29 October 2021

1. Satellite-Based Monitoring—lifetime—reasonableness—imposition after lengthy term of imprisonment—current factors—safeguards

The imposition of lifetime satellite-based monitoring (SBM) on defendant after he pled guilty to kidnapping, robbery with a dangerous weapon, and rape, for which defendant received an active sentence of thirty to forty-three years, was constitutionally permissible despite the lengthy passage of time before SBM could be effectuated, because the reasonableness determination was appropriately based on factors as they existed at the time of the SBM hearing. If at some point in the future the imposition of lifetime SBM were to become unreasonable, statutory avenues of relief provided sufficient safeguards of defendant's constitutional right to be free from unreasonable searches.

2. Satellite-Based Monitoring—lifetime—reasonableness—imposition after lengthy term of imprisonment—aggravated offenders

The imposition of lifetime satellite-based monitoring (SBM) on defendant upon the completion of his sentence for kidnapping, robbery with a dangerous weapon, and rape (for which he received an active sentence of thirty to forty-three years) did not violate defendant's constitutional right to be free from unreasonable searches, where the legitimate and compelling governmental interest in preventing and prosecuting future crimes of sex offenders outweighed the narrowly tailored intrusion into defendant's expectation of privacy.

Justice EARLS dissenting.

Justices HUDSON and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, *State v. Strudwick*, 273 N.C. App. 676 (2020), reversing two orders entered on 8 December 2017 and

19 December 2017 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Supreme Court on 17 May 2021.

Joshua H. Stein, *Attorney General*, *by Sonya Calloway-Durham*, *Special Deputy Attorney General*, *for the State-appellant.*

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MORGAN, Justice.

¶ 1 The State appeals on the basis of a dissent filed in the Court of Appeals' consideration of defendant's challenge to a trial court order imposing lifetime satellite-based monitoring (SBM) following this Court's remand of the case to the lower appellate court for reconsideration of defendant's claims in light of our decision in *State v. Grady*, 372 N.C. 509 (2019) (*Grady III*). Because the intrusion of lifetime SBM into the privacy interests of defendant is outweighed by lifetime SBM's promotion of a compelling governmental interest, the trial court was without error in entering an order requiring defendant to participate in SBM for the remainder of his natural life.

I. Factual and Procedural Background

¶ 2 On 22 March 2016, the victim in this case, a 64-year-old resident of Charlotte, was walking her dog along a greenway near her home when she noticed defendant was approaching her from the rear. The victim stopped to allow defendant to pass her, but once defendant had done so, defendant came back and began speaking with the victim while petting her dog. Shortly thereafter, defendant said to the victim "I'm sorry about this," grabbed the victim by her arm, and began to drag the victim into a wooded area along the greenway. The victim produced a small taser and managed to discharge the device in an effort to protect herself, but with little effect upon defendant. Defendant then pulled out a sock filled with concrete and began to beat the victim over the head, knocking the taser from her grasp. The victim fell to the ground, and defendant dragged her into the woods and across a creek. Once past the creek, defendant wrapped a sweatshirt around the victim's head and threw her face down on the ground. Defendant proceeded to rape the victim and to commit multiple forms of sexual assault upon her body. Defendant threatened to kill the victim with a gun if she did not do what he said and ordered the victim to remain in place for at least one minute while defendant made his escape after defendant had concluded his assault.

Defendant rummaged through the victim's purse, took her cellular telephone, and then ran out of the woods past a group of bystanders who had gathered around the victim's dog in an attempt to locate its owner. The victim exited the woods a short time later and sought assistance from the bystanders, who contacted the police on her behalf. Utilizing the description of defendant and his last known direction of travel as provided by the victim and the bystanders, law enforcement officers located defendant walking along a busy thoroughfare near the crime scene. A search of defendant's person revealed the victim's cellular telephone and a small amount of marijuana. DNA testing ultimately confirmed that defendant was the perpetrator of the attack upon the victim.

¶ 3 On 28 March 2016, a Mecklenburg County grand jury indicted defendant for, among other charges, the offenses of first-degree kidnapping, robbery with a dangerous weapon, and first-degree forcible rape. Defendant appeared with counsel in Superior Court, Mecklenburg County on 2 August 2017, where he pleaded guilty to the above-referenced offenses and allowed the State to present an uncontested factual basis for a plea agreement which described defendant's attack upon the victim. In consideration of defendant's guilty plea to the three felony offenses, the State agreed to dismiss four counts of first-degree sex offense and the misdemeanor charge of possession of marijuana. The trial court accepted defendant's guilty plea and sentenced defendant, pursuant to the plea arrangement, to an active term of incarceration of 360 to 516 months. Defendant was also ordered by the trial court to register as a sex offender for life. The prosecution apprised the trial court of the State's intention to seek the imposition of lifetime SBM and to bring defendant back at a later date for a hearing on the State's request.

¶ 4 The State filed a petition to impose lifetime SBM on defendant upon his release from his active sentence. In response, defendant filed a motion to dismiss the State's petition in which he asserted both facial and as-applied challenges under the Fourth Amendment of the United States Constitution and article I, section 20 of the North Carolina Constitution to North Carolina's SBM statutory structure. The matter came on for hearing on 8 December 2017. At the hearing, the State called Probation Officer Shakira Jones as a witness who, while employed as a probation officer for thirteen years with the North Carolina Department of Public Safety (DPS), had spent most of the previous three years specifically supervising sex offenders who were on probation or post-release supervision following the completion of active sentences for sex crimes. In that capacity, Officer Jones also worked as an instructor who provided initial and refresher training sessions to other probation officers who utilized the state's SBM

program to monitor sex offenders. Officer Jones explained that when an offender is ordered to complete a term of SBM, a 2.5-by-1.5-inch device weighing 8.5 ounces called an "ET-1" is attached to the offender's body using fiber optic straps, usually around the offender's ankle. The ET-1 apparatus is charged using a 10-foot cord that allows the offender to move about while the device is charging. Two hours of charging provides 100 hours of ET-1 operation, and Officer Jones testified that even one of her homeless supervisees had no issues with keeping the unit charged. According to Officer Jones, the ET-1 does not restrict travel, work activities, or participation in regular sports. It can be concealed by wearing long pants.

¶ 5 Officer Jones further testified during the State's presentation that the State's monitoring of sex offenders in the SBM program manifests itself in distinct ways. She related that offenders on probation or post-release supervision typically interact with their supervising officers on a regular basis through visits at the offender's home and at the probation office, where the equipment is checked for functionality. However, individuals placed on unsupervised probation are not actively supervised by an officer, but instead are overseen by a central monitoring office in Raleigh. These unsupervised offenders receive a new ET-1 once a year. Other than these compulsory interactions for supervised offenders and yearly check-ins for unsupervised offenders, a person subject to lifetime SBM would have little interaction with the State, unless something goes amiss. For example, Officer Jones explained that in the event that the ET-1 is low on power or if the device loses its signal, an offender's supervising officer or the Raleigh monitoring office can send a message to the ET-1 which will play for the offender until the offender presses a small button on the unit to acknowledge receipt of the message. If an offender fails to respond to a low battery or lost signal alert, or if an ET-1 remains dormant for six hours, an officer or other state agent will attempt to call the offender to address the issue. In the most extreme cases, such as when an offender attempts to tamper with the ET-1 device, when a sex offender goes to a location where the offender is prohibited from going, or when the offender is unable to independently correct a battery or signal issue, an officer attempts to locate the offender in person and to address any noncompliant or criminal behavior.

¶ 6 Officer Jones elaborated in her testimony for the State on the purpose and operation of the SBM program itself. Officer Jones explained that the purpose of SBM is "to monitor [offenders'] movement and to work closely with other law enforcement agencies so that we can prevent future victims." The SBM program can be used to determine

whether an offender was present at a location where a new sexual assault or crime has occurred, to generate potential suspects for a crime based on its location, or to corroborate a victim's allegations against a particular offender. Conversely, an offender in the SBM program would benefit from being eliminated as a suspect if the offender's tracking device established the offender's location to be a place other than the site at issue. Officer Jones related at the hearing that the State also utilizes the SBM program to ensure that registered sex offenders like defendant are actually remaining at their registered homes at night and are staying away from "exclusion zones"—areas where offenders are not allowed to go—such as schools and daycare facilities. To these ends, the SBM tracker allows the State to access an offender's physical location either in real time or through subsequent review of an offender's movements. The ET-1 only indicates an offender's physical location through the use of cell towers and the Global Positioning System (GPS) and provides no information about an offender's activity at a particular location. Law enforcement officers access an offender's location by interacting with a system operated by the state's SBM vendor BI Incorporated, which displays an offender's location on a map using GPS. Officer Jones testified that offenders on probation and post-release supervision have their locations and data checked at least three times a week by their respective supervising officers according to DPS policy, but could not testify concerning the practices of the Raleigh center in monitoring individuals who had completed their terms of judicially ordered state supervision. Only BI Incorporated and DPS personnel have access to an offender's location information in simultaneous time. While law enforcement officers may contact DPS to obtain historic information about an offender's location in the performance of their duties, all other parties must obtain a court order to be able to access information stored in BI Incorporated's system.

¶ 7 Officer Jones also administered a Static-99 test to defendant, which is an evaluative tool utilized to assess certain information about an offender and the offender's criminal activity in order to determine the offender's risk of committing another sex offense. The Static-99 accounts for, *inter alia*, whether an offender has ever lived with a romantic partner for more than two years, whether the offender knew or was related to the offender's victim, and at what age a particular offender will be released from prison—all of which are factors deemed relevant to a person's propensity to reoffend. While defendant would have scored a total of four points on the Static-99 if the assessment had failed to take into account the age of defendant upon defendant's release from incarceration—an amount which indicates an above-average risk for reoffending—Officer Jones subtracted one point from the Static-99 composite

score since defendant's age would fall within the 40-to-59.9-years-old range upon his release after serving his sentence. The Static-99 therefore reflected a consideration of the lengthy duration of defendant's prison sentence and the corresponding advanced age at which defendant would be released in tallying a total of three points for defendant on the Static-99, ultimately concluding that defendant would have an average risk of reoffending through the commission of another sex offense upon his release from prison in 30 to 43 years.

¶ 8 After Officer Jones concluded her testimony, defendant lodged an oral motion to dismiss. Counsel for the State and for defendant presented arguments as to the reasonableness of lifetime SBM. The trial court denied defendant's motion to dismiss and entertained closing arguments from the parties. Defendant reiterated his argument that "the North Carolina satellite-based monitoring program is facially unconstitutional under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution" in opposing the State's petition to impose lifetime SBM. The trial court found the imposition of lifetime SBM upon defendant to be reasonable and constitutional under both the federal and state constitutions, explaining:

> THE COURT: . . . the Court finds that it is constitutional, and I find also that such a requirement is reasonable, and so I am going to abide by the statute and require that it be satellite-based monitoring for his lifetime.
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> Now, having said that, the law changes all the time, and at some point in the next 30 years, it may change again, and he may [sic] eligible to approach the Court and request a different outcome.

The trial court also declined to dismiss the State's petition based upon grounds of double jeopardy, due process, and cruel and unusual punishment.

¶ 9 The trial court filed a form order imposing lifetime SBM on 8 December 2017 pursuant to N.C.G.S. § 14-208.40A(c) (2017) based upon its determination of the existence of the statutory factor as defined in N.C.G.S. § 14-208.6(1a) (2017) that defendant committed an aggravated offense. On 19 December 2017, the trial court filed a more detailed order containing 27 findings of fact and 11 conclusions of law. The trial court made the following findings of fact relevant to this appeal:

> 7. . . . The monitor consists of a middle unit with two adjustable straps. The middle unit is smaller than the

palm of Officer Jones' hand. The monitor as worn by participants, with straps and battery, weighs 8.5 ounces. Participants typically wear the monitor on their ankle, but some choose to wear it on their wrist. If worn on the ankle, the device cannot be seen when the participant is wearing long pants. The State introduced photographs of the monitor being worn on a participant's ankle. The photographs illustrate that the monitor is a small, relatively unobtrusive device.

8. The SBM system used by the State continuously monitors a participant's location using GPS. If a participant is traveling in a vehicle, the system monitors his speed of travel. The system does not collect any additional information, and it does not collect any information about what a participant is doing at a particular location.

9. The information collected by the system is stored on servers of the State's vendor, BI. The information is not publicly available. Probation officers who supervise SBM participants have access to and monitor the information online.

10. Probation officers who supervise SBM participants are required to review the information three times per week. Some choose to review it daily. They review the information to ensure the participant spends nights at his registered address.

11. Probation officers also monitor the information when they receive alerts from the system. Alerts are generated when a participant tampers with his monitor or enters an exclusion zone. Exclusion zones can include the victim's home, the victim's workplace, schools, and daycare facilities. These alerts require an immediate response from the officer for safety purposes.

12. Alerts are also generated when the monitor's battery is low, or when the monitor has a mechanical problem. These alerts are sent to the participant as well. This type of alert does not require immediate response from the officer. If the participant does not begin charging the monitor after receiving a low battery alert, the probation officer can send him a

message asking him to do so. Following a mechanical alert, the officer contacts the participant to schedule an appointment to correct the problem. These appointments can take place at the probation office or the participant's home.

13. Participants who are not on supervised probation are monitored by an officer for the Department of Public Safety in Raleigh. If this officer receives an alert that requires immediate response, they contact local probation officers to respond.

14. Probation officers physically check the monitors only during alert responses, regular probation appointments, and an annual appointment in which they provide participants with a new monitor. This annual appointment may occur at the probation office or the participant's home.

15. The monitor has 100 hours of battery life if charged for two hours. Participants charge the monitor by connecting the battery to a wall outlet by a charging cord. The charging cord is ten feet long, and participants are able to move around while charging the monitor.

16. Officer Jones supervises a homeless participant who does not have trouble keeping his monitor charged.

17. Officer Jones supervises two participants who work in construction. Neither of them experiences difficulty working because of the monitor.

18. The monitor is waterproof up to 10 feet.

19. The only participant Officer Jones has ever supervised who experienced issues with sport activities participated in extreme sports that caused physical damage to the monitor itself.

20. The monitor does not restrict working activities, ability to travel, or sports activities other than extreme sports.

21. Probationers who are participants must receive permission to travel out of state, but this permission is routinely granted.

> 22. Officer Jones supervises a participant who travels out of state for work on a weekly basis.
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> 23. The purpose of SBM is to assist law enforcement in protecting communities and [sic] prevent future sexual assault victims by monitoring the movement of sex offenders.
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> 24. When a sexual assault is reported, location information from the monitor could be used to implicate the participant as a suspect if he was in the area of the sexual assault, or to eliminate him as a suspect if he was not in the area of a sexual assault.
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> 25. Static-99 is an assessment tool that takes into account multiple factors about the defendant's history in order to determine his risk level.
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> 26. Officer Jones administered a Static-99 to defendant.
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> 27. Defendant scored a 3 on the Static-99 assessment, which indicates average risk. . . .

The trial court also made several conclusions of law pertinent to this appeal:

> 3. Participation in the State's SBM program constitutes a search for purposes of the Fourth Amendment to the United States Constitution. *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2017).
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> 4. Registered sex offenders have a slightly diminished expectation of privacy, as they are subject to the regular conditions imposed by the registry. See N.C.G.S. 14 § [sic], Article 27A.
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> 5. Although imposing lifetime SBM results in an intrusion of privacy; [sic] when considering the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable expectations of privacy, lifetime enrollment in the State's SBM program is reasonable in this case.
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> 6. An order directing defendant to enroll in satellite-based monitoring does not constitute a general

> warrant in violation of Article I, § 20 of the North Carolina Constitution[,] . . .
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> 7. . . . is not a criminal punishment, and does not violate defendant's right to be free from double jeopardy[,] . . .
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> 8. . . . does not violate defendant's right to be free from cruel and unusual punishment[,] . . .
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> 9. . . . does not increase the maximum penalty for a participant's conviction based upon facts not charged in the indictment and not proven beyond a reasonable doubt[,] . . .
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> 10. . . . [and] does not violate the defendant's substantive due process rights[.]
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> [11.] Notwithstanding the arguments made by counsel for the defendant both in court and in his written motion, the satellite-based monitoring statute is constitutional on its face and as applied to defendant under both the United States Constitution and the North Carolina Constitution.

¶ 10 Defendant perfected an appeal of the trial court's order imposing lifetime SBM to the Court of Appeals, which reversed the trial court's order in a unanimous, unpublished opinion filed on 6 August 2019. *State v. Strudwick* (*Strudwick I*), COA18-794, 2019 WL 3562352 (N.C. Ct. App. Aug. 6, 2019) (unpublished). The lower appellate court cited several of its own opinions in which it had reversed similar trial court orders "for the same reasons as argued by [d]efendant" in the wake of the Supreme Court of the United States' decision in *Grady v. North Carolina*, 575 U.S. 306 (2015). *Id.* at *1. On 4 September 2019, the State filed a petition for discretionary review in this Court, seeking an opportunity to argue against the "continued and significant expansion" of the State's burden in cases to prove the reasonableness of the imposition of lifetime SBM under the totality of the circumstances. A few weeks earlier, however, this Court had announced its decision in *Grady III*, which was itself issued in response to the Supreme Court of the United States' mandate to this Court that we reconsider the *Grady* defendant's case in light of the Supreme Court of the United States' conclusion that North Carolina's SBM program constituted a warrantless search which required a reasonableness analysis under the Fourth Amendment. Having received the State's petition for discretionary review in such close temporal proxim-

ity to our pronouncement in *Grady III*, this Court allowed the State's petition for discretionary review "for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in [*Grady III*]."

¶ 11 Upon remand, the Court of Appeals issued a second opinion in this matter. The published decision was rendered by a divided lower appellate court on 6 October 2020, with the Court of Appeals again reversing the trial court's SBM order in this case. *State v. Strudwick* (*Strudwick II*), 273 N.C. App. 676 (2020). Relying primarily on *State v. Gordon* (*Gordon II*), 270 N.C. App. 468 (2020), another case in which the Court of Appeals reversed a trial court's order imposing lifetime SBM, the majority lamented the "impossible burden" placed upon the State in the State's efforts to establish the reasonableness of lifetime SBM in cases where such determinations are required to be made years and sometimes decades before the search will be effected, due to N.C.G.S. § 14-208.40A's requirement that the State seek the imposition of lifetime SBM at the time that a defendant is sentenced. *Strudwick II*, 273 N.C. App. at 681 (quoting *State v. Gordon* (*Gordon I*), 261 N.C. App. 247, 261 (2018)). According to the Court of Appeals majority's invocation of the *Gordon* lineage of cases, establishing the reasonableness of lifetime SBM when an offender had decades left to serve in prison would require the State to prove that the search would remain reasonable despite the inability to know, with any certifiable degree of certainty, the circumstances impacting a defendant's appropriateness for lifetime SBM between defendant's time of sentencing and defendant's time of release from incarceration. *Id.* The majority concluded that "until we receive further guidance from our Supreme Court or new options for addressing the SBM procedure from the General Assembly, under existing law, we are required by law to reverse defendant's SBM order." *Id.* The dissent disagreed with the majority's assignment of dispositive force to the length of time between the moment when the reasonableness determination is made and the moment when the search would be effected, observing that the Court of Appeals

> cannot anticipate nor predict what may or may not occur well into the future, and a prediction or hunch alone is not a legitimate basis to overturn the trial court's statutorily required and lawful imposition of SBM over a defendant still in custody or under state supervision on constitutional grounds.

Id. at 684 (Tyson, J, dissenting). The State filed a notice of appeal from the Court of Appeals decision pursuant to N.C.G.S. § 7A-30(2), based

upon the dissenting opinion.[1] Hence, this Court has been presented with an opportunity to provide the "further guidance" beckoned by the lower appellate court regarding the salient considerations which should constitute and resolve the timing of the reasonableness determination.

II. Analysis

¶ 12 Our standard of review is derived from defendant's claim that the imposition of lifetime SBM under the General Assembly's duly enacted statutory scheme which governs the program is unconstitutional. "Whether a statute is constitutional is a question of law that this Court reviews de novo. In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Grady III*, 372 N.C. at 521–22 (quoting first from *State v. Romano*, 369 N.C. 678, 685 (2017), then second from *Cooper v. Berger*, 370 N.C. 392, 413 (2018)) (extraneity omitted). It is the burden of the proponent of a finding of facial unconstitutionality to prove beyond a reasonable doubt that an act of the General Assembly is unconstitutional in every sense. *State v. Bryant*, 359 N.C. 554, 564 (2005).

A. Timing of Reasonableness Determination

¶ 13 **[1]** As an initial matter, the Court of Appeals determined in this case that the State had failed to meet its burden of showing that lifetime SBM constituted a reasonable search in defendant's case because such a demonstration of reasonableness in light of defendant's incarceration over the course of at least thirty years required that

> the State must divine all the possible future events that might occur over the ten or twenty years that the

1. We recognize that, during the time period between the State's perfection of its appeal and the issuance of this opinion, the General Assembly enacted a major revision of the state's SBM program as it relates to sex offenders by the passage of Session Law 2021-138, § 18. Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf. However, this new legislation does not take effect until 1 December 2021. *Id.* at § 18(p). Nevertheless, although brief in its ongoing applicability, the SBM program as it existed at the time of defendant's SBM determination by the trial court still provides governing authority for the trial court's orders under review in the case sub judice, and the General Assembly remains empowered to further amend the SBM program up to or after the effective date of the new legislation. This Court is also aware that this case presents us with an issue that remains unaltered under the new enactment: the lawfulness of the gapped time sequence between the point at which the prosecution seeks, and the trial court potentially orders, the imposition of the continuing warrantless search that SBM presents and the point at which the search is actually imposed upon defendant. Thus, "the version of the SBM program in effect on [8 December 2017], the date of defendant's SBM determination, governs the present case." *State v. Hilton*, 2021-NCSC-115, ¶ 3, n. 1.

> offender sits in prison and then prove that satellite-based monitoring will be reasonable in every one of those alternate future realities. That is an impossible burden and one that the State will never satisfy.

Strudwick II, 273 N.C. App. at 681. In employing this premise as a guidepost in its examination of the State's ability to show the reasonableness of the implementation of SBM in a case such as the present one in which a defendant is subject to the State's oversight for a substantial period prior to the imposition of SBM, the lower appellate court expands its perception that the State cannot possibly satisfy the reasonableness standard under such circumstances to a conclusion that the entirety of the lifetime SBM statutory structure is facially unconstitutional. However, this approach overlooks, undervalues, or otherwise misidentifies the aspect here that the State is not tasked with the responsibility to demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present; rather, the State is tasked under a legislative enactment presumed to be constitutional with the responsibility to demonstrate the reasonableness of a search at its evaluation in the present for which the State is bound to apply for the future effectuation of a search.

¶ 14 Just as "[f]airness and common sense dictate that an accused must be tried and sentenced under the state of the law as it exists" at the time of his crime, *State v. Stockton*, 1979 WL 208803, *3 (Ohio Ct. App. April 4, 1979) (citing *Dobbert v. Florida*, 432 U.S. 282, 301 (1977)), identical guidance should apply in the circumstance at issue wherein the current state of the law mandates that the prosecution must request a trial court's imposition of lifetime SBM on a duly convicted sex offender at the offender's sentencing hearing if SBM is being sought. Under this Court's enduring principles, the General Assembly's requirement that the determination of the imposition of lifetime SBM is to be conducted "during the sentencing phase," N.C.G.S. § 14-208.40A (2019), is presumptively constitutional. *Hart v. State*, 368 N.C. 122, 126 (2015). While the State properly faces a challenging hurdle when attempting to overcome the Fourth Amendment's protections against unreasonable searches when the State requests at a defendant's sentencing hearing that a trial court order the imposition of lifetime SBM, nonetheless the challenge is not intensified or heightened concerning the State's necessity to establish the reasonableness of lifetime SBM merely because the State's compliance with the General Assembly's procedural requirements at a defendant's sentencing hearing includes the State's request for the lifetime SBM at the end of the State's oversight of a defendant, which does not happen to

end until decades later. In light of these considerations, defendant in the instant case has failed to satisfy his burden to show, as the proponent of a facial constitutional challenge, that the legislative enactment governing lifetime SBM is unconstitutional beyond a reasonable doubt. *Id.*

¶ 15 Defendant's dispute about the timing of the reasonableness determination in light of the timing of the actual effectuation of the SBM search, decades later, as reflected in the dispositive discussion of the issue by the lower appellate court, is largely allayed by the civil nature of the penalty imposed upon him. Our decision here applies to defendant as he is currently assessed, to the law as it is currently applied, and to the search as it is currently adapted. In the event that defendant is subsequently assessed more favorably such that the search becomes unreasonable because defendant is deemed to no longer constitute the threat to public safety that he has been determined to pose at the present time,[2] then he may petition the Post-Release Supervision and Parole Commission for release from the SBM program upon the passage of one year from his release from prison if defendant can show that he has "not received any additional reportable convictions during the period of satellite-based monitoring and [he] has substantially complied with the provisions of" the SBM program, and that he is "not likely to pose a threat to the safety of others." N.C.G.S. § 14-208.43 (2019). However, this statutory relief from the continued imposition of SBM upon defendant, which is readily available to him, is not the sole vehicle through which defendant could be released from the obligation of SBM upon the trial court's determination that the search has become unreasonable.

¶ 16 Rule 60 of the North Carolina Rules of Civil Procedure also affords potential relief to defendant from prospective application of lifetime SBM or other relief from the SBM order, while maintaining deference to the constitutionality of any search effected during the relevant time period. Rule 60 provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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2. In his brief, defendant provides examples of such developments which may, if they come to fruition, reduce his threat to the public: "positive clinical assessments after years of cognitive and psychological counseling; educational achievement; skill development; an improved prognosis due to advancements in psychiatric medication; as well as any physical disabilities [defendant] may develop far in the future."

> (5) . . . it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.
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> The motion shall be made within a reasonable time. . . .

N.C. R. Civ. P. 60(b) (2019). A Rule 60(b) motion "may not be used as a substitute for appeal," and the appellate process, not Rule 60(b), is the proper apparatus for the correction of errors of law committed by a trial court. *Davis v. Davis*, 360 N.C. 518, 523 (2006). Nonetheless, a trial court that has ordered the imposition of a continuing, warrantless search at a time when such a search was reasonable has not committed an error of law if the continuing, warrantless search becomes unreasonable through changes in circumstances pertaining to the nature, character, and subject of the search. While an otherwise reasonable, warrantless Fourth Amendment search may become unreasonable "by virtue of its intolerable intensity and scope," *Terry v. Ohio*, 392 U.S. 1, 18 (1968), or "as a result of its duration or for other reasons," *Segura v. United States*, 468 U.S. 796, 812 (1984), such circumstances do not render impossible, as the Court of Appeals perceived, the ability of the State to show, and the properness of a trial court to find, the present reasonableness of a search to be conducted in the future. This is particularly true in the event that each of the reasonableness factors which are currently germane to the present case remain materially unchanged in the interim. After all, it has been long established by this Court that "[a]n individual challenging the facial constitutionality of a legislative act must establish that *no* set of circumstances exists under which the act would be valid." *State v. Thompson*, 349 N.C. 483, 491 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added) (extraneity omitted). It is likewise noteworthy that the only circumstance preventing the immediate imposition of lifetime SBM upon defendant is his superseding term of lengthy incarceration which delays the identified efficacy of SBM.

¶ 17 The availability of the application of Rule 60's provisions to a case such as the current one effectively preserves the rights of individuals like defendant who are subject to the imposition of lifetime SBM only after a significant duration of time has passed, while protecting the sanctity of the constitutionality of the statutory structure of the SBM program which has been legislatively created. Over the course of time, in the event that the circumstances of defendant change in such a manner that the intrusion of lifetime SBM upon defendant's privacy is no

longer reasonable to promote a legitimate governmental interest, then defendant may petition the trial court to consider, as to the civil order of SBM, that "it is no longer equitable that the judgment should have prospective application," and defendant may move the trial court to have the judgment set aside. N.C. R. Civ. P. 60(b)(5). And ironically, while the lower appellate court opined that the State's inherent inability to "divine all the possible events that might occur over the ten or twenty years that the offender sits in prison" negatively impacted the State's ability to establish reasonableness, on the other hand such an inability to predict all eventualities with certainty inures to the benefit of defendant, who is not curtailed in his opportunity to show "*any* other reason justifying relief from the operation of the judgment" which may occur or develop during the time period under scrutiny. N.C. R. Civ. P. 60(b)(6) (emphasis added). The trial courts of this state are endowed with "ample power to vacate judgments whenever such action is appropriate to accomplish justice" through the operation of Rule 60(b)(6) and are invited to wield that power in a judicious manner. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723 (1971) (extraneity omitted).

¶ 18 In sum, we conclude that the combination of the available resources for defendant's potential relief from the continued imposition of lifetime SBM, in the criminal administrative review form of the Post-Release Supervision and Parole Commission and the civil judicial review form of Rule 60 of the North Carolina Rules of Civil Procedure,[3] are sufficient substantive and procedural safeguards to protect defendant's constitutional rights against unreasonable searches, while preserving the constitutionality of the General Assembly's SBM statutory structure which requires the establishment of reasonableness at the mandated time of a defendant's sentencing hearing when the State's request for SBM monitoring must be made for a trial court's consideration.

B. Reasonableness of Lifetime SBM

¶ 19 **[2]** Having addressed the concerns of the Court of Appeals regarding the timing of the entry of the lifetime SBM determination upon defendant, we next consider the implication of Fourth Amendment jurisprudence, and particularly the application of *Grady III*, to the specific facts of defendant's case. In *Grady v. North Carolina*, the Supreme Court of the

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3. While cautiously refraining from the inappropriate rendition of an advisory opinion, we further note that the passage of S.L. 2021-138, § 18(i) presents a potential additional avenue of relief to defendant as "[a]n offender who is enrolled in a satellite-based monitoring [sic] for life." Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf.

United States held that, because the state's SBM program operates "by physically intruding on a subject's body, it effects a Fourth Amendment search." 575 U.S. 306, 310 (2015). Due to the lifetime SBM program's coverage by the Fourth Amendment, the high court vacated our dismissal of defendant's appeal in the *Grady* case and remanded the matter to this Court for an analysis of whether "the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations" resulted in the conclusion that the ongoing, warrantless search imposed by the SBM program was reasonable. *Id.* at 310. We fulfilled this directive from our nation's highest tribunal through the issuance of our opinion in *Grady III*, in which we affirmed as modified a Court of Appeals decision reversing a trial court's order which imposed lifetime SBM on the *Grady* defendant based solely upon his status as a recidivist. *Grady III*, 372 N.C. at 545, 550–51. This Court first addressed the intrusion upon reasonable privacy expectations which is created by the imposition of lifetime SBM. Our approach ultimately employed a three-pronged inquiry into (1) the nature of the *Grady* defendant's privacy interest itself, *id.* at 527, (2) the character of the intrusion effected by the lifetime SBM program, *id.* at 527, 534 (citing *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 658 (1995)), and (3) the "nature and purpose of the search" where we "consider[ed] the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Id.* at 538 (quoting *Vernonia*, 515 U.S. at 652–53) (extraneity omitted).

¶ 20 This Court in *Grady III*, "mindful of our duty . . . to not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it," *id.* at 549, expressly limited our as-applied determination of unconstitutionality to defendants who fit squarely within the *Grady* defendant's exact status: (1) a criminal defendant (2) not currently under any supervisory relationship with the State (3) who is ordered to submit to lifetime SBM based solely on the fact that the defendant is a recidivist as defined by statute, and (4) who also is not "classified as a sexually violent predator, convicted of an aggravated offense, or . . . convicted of statutory rape or statutory sex offense with a victim under the age of thirteen." *Id.* at 550. As defendant in the case sub judice was ordered to submit to lifetime SBM based upon his conviction for an aggravated offense, the holding of *Grady III* concerning the unconstitutionality of North Carolina's lifetime SBM scheme as it applies to recidivists, including *Grady III*'s discussion concerning the State's burden of proof as to the effect of lifetime SBM on reducing recidivism, is wholly inapplicable to the instant case. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("It is axiom-

atic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." (extraneity omitted)). Instead, we are bound to apply the instructions which we enunciated in *Grady III*—and further developed in *Hilton*—in order to determine the reasonableness of the trial court's imposition of lifetime SBM in defendant's case. *See Hilton*, 2021-NCSC-115, ¶ 18 (recognizing that *Grady III*'s as-applied holding was limited to the facts of that case, while employing the Fourth Amendment reasonableness analysis utilized in *Grady III* as drawn from the Supreme Court's guidance in *Grady I*).

¶ 21 Starting with the nature of defendant's privacy interest, the State surely gains pervasive access to defendant's person, home, vehicle, and location through the imposition of lifetime SBM that the State would not acquire otherwise if defendant were not subject to lifetime SBM monitoring. In *Grady III*, we noted that the search impinges upon defendant's "right to be secure in his person [and] his expectation of privacy in the whole of his physical movements." 372 N.C. at 531 (extraneity omitted). This conclusion in *Grady III* regarding the nature of defendant's privacy interest once he is subject to lifetime SBM remains intact and must be considered in the case at bar. However, defendant's expectation of privacy is duly diminished by virtue of his status as a convicted felon generally and as a convicted sex offender specifically. *Hilton*, 2021-NCSC-115, ¶ 30 ("Though an aggravated offender regains some of his privacy interests upon the completion of his post-release supervision term, these interests remain impaired for the remainder of his life due to his status as a convicted aggravated sex offender.").

¶ 22 Secondly, while we noted in *Grady III* that our decision in *State v. Bowditch* "did not address the defendants' expectations of privacy with respect to the physical search of their person or their expectations of privacy in their location and movements," we did sufficiently incorporate in *Bowditch* the invasion of a defendant's home—another bastion zealously guarded under the Fourth Amendment—for purposes of maintaining SBM equipment. *Grady III*, 372 N.C. at 532 (discussing *State v. Bowditch*, 364 N.C. 335 (2010)). In *Bowditch*, this Court recognized that "it is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony." *Bowditch*, 364 N.C. at 349–50. The *Bowditch* Court cited a plethora of cases which illustrate the principle that the Fourth Amendment expectation of privacy of persons convicted of felonious sex offenses is routinely subject to encroachment by civil regulations and acts of criminal procedure. *Id.* at 350 (citing *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam) for the constitutional, forced

collection of blood samples from felons; citing *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998) for its discussion of sex offender registries; citing *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992) for its holding that probationers lose their Fourth Amendment protections against warrantless searches of their home pursuant to established supervision programs; citing *Standley v. Town of Woodfin*, 362 N.C. 328, 329–30 (2008) for its holding that municipalities may constitutionally ban sex offenders from public parks; citing *State v. Bryant*, 359 N.C. 554, 557–70 (2005) for its conclusion that no due process violation occurs when a sex offender is required to register in North Carolina upon moving to the state despite only being informed of his duty to register in his original state). While we further noted in *Grady III* that the cases relied upon by *Bowditch* "either deal exclusively with prisoners and probationers, do not hold that a conviction creates a diminished expectation of privacy, or do not address privacy rights at all," 372 N.C. at 532, it is clear that *Bowditch* establishes that it is constitutionally permissible for the State to treat a sex offender differently than a member of the general population as a result of the offender's felony conviction for a sex offense. *Hilton*, 2021-NCSC-115, ¶ 30. Concomitantly, a sex offender such as defendant possesses a constitutionally permissible reduction in the offender's expectation of privacy in matters such as the imposition of lifetime SBM.

¶ 23 Lastly, regarding the character of the intrusion which defendant challenges, we recognized in *Grady III* that this factor requires us to "contemplate[ ] the degree of and manner in which the search intrudes upon legitimate expectations of privacy." *Grady III*, 372 N.C. at 534 (extraneity omitted). During the sentencing phase of defendant's trial, the uncontroverted evidence presented by the State showed that the search occasioned by SBM reveals only defendant's physical location, and nothing "about what a participant is doing at a particular location." Testimony also indicated that the State is not allowed to utilize the data which it collects through the SBM program for any unauthorized purpose without running afoul of the Fourth Amendment. This Court in *Grady III* expressed our awareness of the "intimate window into an individual's privacies of life" that the state's SBM program provides. *Grady III*, 372 N.C. at 538 (extraneity omitted). The purposes of the SBM program—to assist the State in both preventing and solving crime—are universally recognized as legitimate and compelling. *Maryland v. King*, 569 U.S. 435, 453 (2013) ("The government's interest in preventing crime by arrestees is both legitimate and compelling." (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987))). In directing our attention to, and in placing such dispositive weight on, this clearly legitimate goal of the

SBM program, the State has compellingly highlighted the safeguards which effectively narrow the State's utilization of SBM to a singular permissible scope of the search effected: to track the location of convicted sex offenders in order to promote the prevention and prosecution of future crimes by those individuals. Any extension of this use of the compiled data would present an impermissible extension of the scope of the authorized search. *Terry*, 392 U.S. at 19 ("The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.") (extraneity omitted). The State's burden of establishing the reasonableness of a warrantless search therefore is ongoing because "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 19–20.

¶ 24 The trial court found that the ET-1 is a "relatively small, unobtrusive device" that cannot "be seen when the participant is wearing long pants." As defendant has failed to challenge any of the trial court's findings of fact, and as "unchallenged findings of fact are binding on appeal," *Brackett v. Thomas*, 371 N.C. 121, 127 (2018), we are constrained to this description of the instrument. And while we rued in *Grady III* "[t]he lack of judicial discretion in ordering the imposition of SBM on any particular individual and the absence of judicial review of the continued need for SBM," *Grady III*, 372 N.C. at 535, the present case allows us to assuage these lamentations through a combination of the promulgation of *Grady III* itself—which now requires trial courts to determine the reasonableness of the search imposed on a particular defendant upon that defendant's challenge to the State's efforts to impose SBM—and our previous discussion of Rule 60 which illuminates the availability of post hoc judicial review of the reasonableness of the search in the event that a change in circumstances warrants such a review. The utility of these methods of judicial review, in conjunction with the access to subsequent, periodic review by the Post-Release Supervision and Parole Commission afforded defendant by N.C.G.S. § 14-208.43, is reflected in the General Assembly's aforementioned codification of similar procedures in its reconstruction of the state's SBM scheme after our opinion in *Grady III*. Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf. The law-making branch of North Carolina has deemed it appropriate to legislatively memorialize the protections afforded by the overlapping substantive, procedural, administrative, and judicial routes discussed herein, which remain available to defendant and others similarly

situated—namely, those sex offenders ordered to submit to lifetime SBM—up to the designated effective date of 1 December 2021 for Session Law 2021-138, § 18, when the provisions of the recent legislative enactment are slated to supplant the outgoing SBM program which presently prevails.

¶ 25 Therefore, as we consider the inconvenience to defendant in wearing a small, unobtrusive device pursuant to SBM protocols that only provides the State with his physical location which the State may use solely for its legitimate governmental interest in preventing and prosecuting future crimes committed by defendant, in conjunction with the added protection of judicial review as to the reasonableness of the search both at its imposition and at such times as circumstances may render the search unreasonable, we conclude that the imposition of lifetime SBM on defendant constitutes a pervasive but tempered intrusion upon his Fourth Amendment interests. *Hilton*, 2021-NCSC-115, ¶ 35 ("SBM's collection of information regarding physical location and movements effects only an incremental intrusion into an aggravated offender's diminished expectation of privacy.").

¶ 26 The governmental interest which the State advances as the purpose served by the imposition of lifetime SBM upon a sex offender is well documented as being both legitimate and compelling. *King*, 569 U.S. at 453. This governmental interest serves to assist law enforcement in preventing and prosecuting future crimes committed by sex offenders. *See Bowditch*, 364 N.C. at 342–43 ("The purpose of this Article is to assist law enforcement agencies' efforts to protect communities. Understandably, section 14–208.5 explicitly refers to registration, but the SBM program is consistent with that section's express goals of compiling and fostering the 'exchange of relevant information' concerning sex offenders.") (extraneity omitted); *see also Grady III*, 372 N.C. at 539 ("Sexual offenses are among the most disturbing and damaging of all crimes, and certainly the public supports the General Assembly's efforts to ensure that victims, both past and potential, are protected from such harm.") (quoting *Bowditch*, 364 N.C. at 353 (Hudson, J., dissenting)). As we recognized in both *Grady III* and *Hilton*, "the State's interest in solving crimes and facilitating apprehension of suspects so as to protect the public from sex offenders" is both legitimate and supported by the public through acts promulgated by the General Assembly. *Grady III*, 372 N.C. at 538–39; *accord Hilton*, 2021-NCSC-115, ¶¶ 19–23. More broadly, the maintenance of public safety is "a legitimate nonpunitive purpose" of civil regulatory schemes so long as the legislative enactments which provide operative force to the civil regulations bear some potency in addressing the societal ill of crime. *Smith v. Doe*, 538 U.S. 84, 102–03 (2003).

¶ 27 In her testimony before the trial court and unlike the testimony provided by the State's witness in *Grady III*, Officer Jones testified concerning situations in which lifetime SBM would be obviously effective in assisting law enforcement with achieving the constitutionally endorsed purpose of preventing and solving future crimes by sex offenders. As reflected in the trial court's findings of fact, which we are bound to accept as supported by competent evidence in light of their uncontested nature, *Brackett*, 371 N.C. at 127, "when a sexual assault is reported, location information from the monitor could be used to implicate the participant as a suspect if he was in the area of the sexual assault, or to eliminate him as a suspect if he was not in the area of a sexual assault." Law enforcement may also use the fact that a sex offender is subject to lifetime SBM to ensure that the offender is actually residing at the residence that he is statutorily required to report to the local sheriff, the violation of which is a Class F felony. N.C.G.S. § 14-208.11 (2019). These observations further buttress the reasonableness of lifetime SBM in appropriate cases, including the instant one.

¶ 28 The state's lifetime SBM program promotes a legitimate and compelling governmental interest. When utilized for the stated purpose, the lifetime SBM program is constitutional due to its promotion of the legitimate and compelling governmental interest which outweighs its narrow, tailored intrusion into defendant's expectation of privacy in his person, home, vehicle, and location. Therefore, the search authorized by the trial court's orders in this case is reasonable and permissible under the Fourth Amendment.

III. Conclusion

¶ 29 Based upon the foregoing factual background, procedural background, and legal analysis, this Court concludes that the implementation of lifetime satellite-based monitoring is constitutionally permissible and is applicable to defendant under the Fourth Amendment as a reasonable, continuing, and warrantless search based upon the specific facts of defendant's case. The conclusion of this analysis renders the trial court's order in this case, which imposed continuous GPS tracking using a small, unobtrusive ankle monitor on defendant for life based upon the specific facts of his case, constitutionally permissible under the Fourth Amendment as a reasonable, continuing, warrantless search. Therefore, the opinion of the Court of Appeals is reversed, and the trial court's 8 December 2017 and 19 December 2017 orders remain in full force and effect.

REVERSED.

Justice EARLS dissenting.

¶ 30 The Fourth Amendment only functions if courts are willing to enforce it. Unfortunately, today, this Court has once again proven unwilling to give meaning to the protections the Fourth Amendment provides to the people of North Carolina. As it did in *State v. Hilton*, the majority here resuscitates numerous arguments previously rejected by this Court and bends over backwards to save the State from a constitutional problem of its own making. This time, the majority does so in the service of its remarkable conclusion that a court today can assess the reasonableness of a search that will be initiated when (and if) Mr. Strudwick is released from prison decades in the future, a search will be carried out for as long as Mr. Strudwick lives beyond his release. Fortunately, as the majority now recognizes, its decision is of limited practical importance, given that the General Assembly has just "enacted a major revision of the state's SBM program as it relates to sex offenders" which effectively eliminates lifetime SBM in this state. Regardless, I cannot join the majority in its cavalier disregard for the protections afforded to all North Carolinians under the state and federal constitutions.

¶ 31 To justify flouting the precedent we established in *Grady III*, the majority again reaches for the canard that when a defendant is ordered to enroll in lifetime SBM "based upon his conviction for an aggravated offense, the holding of *Grady III* . . . is wholly inapplicable[.]" Once again, I note that the Fourth Amendment we interpreted in *Grady III* is the same Fourth Amendment we interpreted in *Hilton*, which is the same Fourth Amendment we are called upon to interpret in this case. We articulated legal principles regarding the proper interpretation of the scope of protections afforded by the Fourth Amendment in *Grady III*. We reserved judgment as to how those principles should be applied in a different case on different facts. But it is sophistry to, once again, treat *Grady III* as if it had nothing to say about the constitutionality of ordering a sex offender to enroll in lifetime SBM. The majority's circumlocutions are window dressing for what is, at its core, a declaration that precedents which this majority does not like will not be respected simply because the majority does not like them.

¶ 32 The majority's labored efforts to reconcile *Hilton* with *Grady III* are unconvincing. Invoking *Grady III* and then adopting legal principles we expressly rejected in that case is not respecting precedent.

¶ 33 To pick just one example, the majority duly notes that *Grady III*'s conclusion "regarding the nature of defendant's privacy once he is subject to lifetime SBM remains intact and must be considered in the case

at bar." In *Grady III* we stated that "[w]e cannot agree" with the proposition that the "physical restrictions" associated with enrolling in SBM "which require defendant to be tethered to a wall for what amounts to one month out of every year, are 'more inconvenient than intrusive.' " *State v. Grady*, 372 N.C. 509, 536 (2019) (*Grady III*). We held that "being required to wear an ankle appendage, which emits repeating voice commands when the signal is lost or when the battery is low, and which requires the individual to remain plugged into a wall every day for two hours," and which constantly tracks an individual's real-time location data in perpetuity, is a significant intrusion on the individual's privacy interests and is "distinct in its nature from that attendant upon sex offender registration." *Id.* at 537; *see also id.* at 529 ("SBM does not, as the trial court concluded, 'merely monitor[ ] [defendant's] location'; instead, it 'gives police access to a category of information otherwise unknowable,' by 'provid[ing] an all-encompassing record of the holder's whereabouts,' and 'an intimate window into [defendant's] life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2217–2218 (2018))). Yet the majority decides it is not bound by this reasoning and instead minimizes "the inconvenience to defendant in wearing a small, unobtrusive device pursuant to SBM protocols that only provides the State with his physical location," an intrusion the majority then justifies by emphasizing that a defendant's "expectation of privacy is duly diminished by virtue of his status as a convicted felon generally and as a convicted sex offender specifically."

¶ 34 The myriad ways in which this majority has turned *Grady III* on its head are comprehensively addressed in dissenting opinions in *Hilton* and *Ricks*. *See generally State v. Hilton*, 2021-NCSC-115, ¶ 43–83 (Earls, J., dissenting); *State v. Ricks*, 2021-NCSC-116, ¶ 12–21 (Hudson, J., dissenting). I will not rehash every instance here. I will only suggest that, once again, the majority refuses to own up to the jurisprudential havoc it wreaks on its way to reaching its desired outcome.

¶ 35 However, I am compelled to address two additional arguments the majority endorses in this case which further compound the errors it committed in *Hilton*. First, the majority transforms the longstanding but always rebuttable presumption that legislation enacted by the General Assembly respects constitutional bounds into an impenetrable fortress shielding this version of the SBM statutes from judicial review. The majority appears to suggest that the State's actions are constitutional because they were undertaken in accordance with "a legislative enactment

presumed to be constitutional[.]" But the question before this Court is precisely whether or not the "legislative enactment" the State is acting in accordance with is or is not constitutional. The fact that the SBM statute, like all statutes, is "presumptively constitutional" does not mean that the statute is *actually* constitutional. *See Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4 (1992) ("The presumption of constitutionality is not, however, and should not be, conclusive.").

¶ 36 The presumption of constitutionality is, essentially, a substantive canon of interpretation which reminds courts to "not lightly assume that an act of the legislature," the "agent of the people for enacting laws," "violates the will of the people of North Carolina as expressed by them in their Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448 (1989). It counsels deference towards legislative enactments, not an abdication of our "duty . . . in proper cases, to declare an act of the Legislature unconstitutional, [an] obligation imposed upon the courts to declare what the law is." *State v. Knight*, 169 N.C. 333, 351–52 (1915). The majority tries to prove the constitutionality of the SBM statute by reference to the fact that the General Assembly chose to enact it, but that ship sailed "nearly sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)," when this Court recognized "that it is the duty of the judicial branch to interpret the law, including the North Carolina Constitution. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787)." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, ¶ 14. In its application of the presumption of constitutionality, the majority deals the General Assembly a trump card it can play any time the constitutionality of a legislative enactment is challenged.

¶ 37 The majority's unwillingness to enforce constitutional limitations on the General Assembly's authority is especially inappropriate in this case given the nature of the legislation at issue and the category of individuals the legislation targets. Mandatory lifetime enrollment in the SBM program necessarily implicates an individual's "fundamental right to privacy . . . [in] his home," *State v. Elder*, 368 N.C. 70, 74 (2015), "which is protected by the highest constitutional threshold and thus may only be breached in specific, narrow circumstances." *State v. Grice*, 367 N.C. 753, 760 (2015). When the State asserts for itself the authority to cross that threshold, and in the process puts in jeopardy a fundamental right that the people of North Carolina have reserved for themselves in their state and federal constitutions, we have an obligation to rigorously scrutinize the challenged enactment. Our obligation cannot be discharged by outsourcing our work to the General Assembly, particularly when the legislation imposes debilities upon a class of individuals who are subject to widespread public opprobrium. *Cf. Texfi Indus., Inc. v. City*

of Fayetteville, 301 N.C. 1, 11 (1980) ("[W]here legislation or governmental action affects discrete and insular minorities, the presumption of constitutionality fades because the traditional political processes may have broken down."). The majority's "casual dismissal of Fourth Amendment rights runs contrary to one of this nation's most cherished ideals: the notion of the right to privacy in our own homes and protection against intrusion by the State into our personal effects and property." *State v. Bowditch*, 364 N.C. 335, 365 (2010) (Hudson, J., dissenting).

¶ 38 Second, the majority improperly excuses the State from its burden of proving the reasonableness of the search it seeks to conduct. Under the Fourth Amendment, the burden is on the State to demonstrate that a search is reasonable. *See*, *e.g.*, *Grady III*, 372 N.C. at 543 ("[T]he State bears the burden of proving the reasonableness of a warrantless search."). When an individual is ordered to enroll in SBM, the State continues to effectuate a search of that individual within the meaning of the Fourth Amendment unless and until that individual's requirement to enroll in SBM is terminated. Thus, to prove that SBM is constitutional, the State must provide evidence to support its assertion that it is reasonable to initiate the search when the search will be initiated and to carry out the search for as long as the search will be carried out.

¶ 39 Rather than determine whether the State has proven that a search it will not initiate for decades is reasonable—or whether the State has proven that it will be reasonable to continue this search in perpetuity—the majority wishes away the problem. According to the majority, to hold the State to its burden to prove reasonableness under the Fourth Amendment under the current SBM statute is to impose an "impossible burden." In my view, the majority is correct that it is impossible for the State to prove it is reasonable to order Mr. Strudwick to submit to SBM decades from now and remain enrolled for the remainder of his life, after he has completed the terms of a 360 to 516 month period of incarceration ostensibly imposed at least in part to rehabilitate him, and given the likely evolutions in technology that very well could change both the nature and the intrusiveness of the search. Yet that is reason to hold the statute unconstitutional under circumstances in which it requires the State to do the impossible, not to absolve the State of its obligation to meet constitutional requirements.

¶ 40 The crux of the majority's position appears to be that because "the State *is* tasked under a legislative enactment presumed to be constitutional with the responsibility to demonstrate the reasonableness of a search," the State *must* be able to demonstrate that a search is reasonable in all of the circumstances contemplated by the statute. Put another way, the majority appears to be saying that because N.C.G.S.

§ 14-208.40A (2019) is "presumptively constitutional," and because the State is acting in accordance with this provision when it "requests at a defendant's sentencing hearing that a trial court order the imposition of lifetime SBM," then the State's actions undertaken in accordance with subsection § 14-208.40A are *ipso facto* constitutional. Again, the fact that the State is acting pursuant to a legislative enactment presumed to be constitutional does not immunize that enactment from constitutional challenge. Under the procedure set forth in N.C.G.S. § 14-208.40A, it is impossible for the State to demonstrate that ordering an individual to enroll in lifetime SBM to begin after a period of incarceration that will last decades, because the State "is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis." *State v. Strudwick*, 273 N.C. App. 676, 680 (2020) (quoting *State v. Gordon*, 270 N.C. App. 468, 475 (2020), *review allowed*, *writ allowed*, 853 S.E.2d 148 (N.C. 2021)). Our obligation under these circumstances is to enforce the Fourth Amendment. Any remedy lies with the legislature, who possesses the indisputable authority to amend a statute to bring it into compliance with the constitutions of North Carolina and the United States. *See id.* at 681 ("Our General Assembly could remedy this 'impossible burden' imposed upon the State by amending the relevant statutes . . . ."). Moreover, that is precisely what the legislature has attempted in enacting Session Law 2021-138, § 18. The Court of Appeals recognized that it lacked the authority to suspend the constitution to salvage a statute which compelled the State to violate an individual's fundamental constitutional rights. We should not shirk our obligation to do the same.

¶ 41 The majority's other attempts to rescue the order requiring Mr. Strudwick to enroll in lifetime SBM are similarly unavailing. Once again ignoring a legal principle we established in *Grady III* that it now finds inconvenient, the majority asserts that lifetime SBM is not really lifetime SBM because "Rule 60 of the North Carolina Rules of Civil Procedure also affords potential relief to defendant from prospective application of lifetime SBM or other relief from the SBM order, while maintaining deference to the constitutionality of any search effected during the relevant time period." If it is the duration of the search contemplated that renders an SBM order unconstitutional, then the solution is to limit the duration of the search, which the legislature did when it functionally ended lifetime SBM. *See* Session Law 2021-138, § 18.(d) (providing that an offender eligible for SBM pursuant to N.C.G.S. § 14-208.40(a)(1) shall be ordered to enroll in SBM for a maximum period of ten years). The solution is not to endorse an open-ended search on the promise that someday, some other court might step in to relieve an individual of an unconstitutional order.

¶ 42 Mr. Strudwick pleaded guilty to committing an egregious crime. He will spend 360 to 516 months in prison as a consequence. No one disputes that the State can take reasonable measures to mitigate the risk that Mr. Strudwick will commit another crime when and if he is released from prison. Where I diverge from the majority is in its willingness to condone the State's failure to adhere to constitutional limits. In its rush to ensure that the State can claim the constitutional authority to order Mr. Strudwick to enroll in SBM after he completes the terms of his sentence, for the rest of his life, regardless of how Mr. Strudwick or monitoring technologies change over the next thirty to forty-three years, and notwithstanding a recent revision to the SBM statute which will reduce his period of enrollment to ten years and provides him with significantly enhanced procedural protections, the majority once again treats the Fourth Amendment as a dead letter. Therefore, I respectfully dissent.

Justices HUDSON and ERVIN join in this dissenting opinion.

JUSTIN WAYNE WARD
v.
JESSICA MARIE HALPRIN

No. 2A21

Filed 29 October 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 274 N.C. App. 494, 853 S.E.2d 7 (2020), affirming orders entered on 24 October 2018 and 2 May 2019 by Judge Aretha V. Blake in District Court, Mecklenburg County. Heard in the Supreme Court on 5 October 2021.

Wofford Burt, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for plaintiff appellant.

Fox Rothschild LLP, by Michelle D. Connell and Kip D. Nelson, and Tom Bush Law Group, by Tom Bush and Rachel Rogers Hamrick, for defendant appellee.

PER CURIAM.

AFFIRMED.

ALDEN v. OSBORNE

[379 N.C. 122 (2021)]

CHRISTINE ALDEN	)	
	)	
v.	)	Alleghany County
	)	
LISA OSBORNE	)	

No. 326P21

ORDER

Pursuant to this Court's Order issued 31 August 2021 allowing Respondent's Motion for a Temporary Stay of the 27 August 2021 Order of the Court of Appeals in this matter, and pursuant to Rule 21(a)(2) of the North Carolina Rules of Appellate Procedure, the Court, upon its own initiative, sets the following schedule in order to expedite further proceedings in this Court: Any petition by any party seeking further review by this Court of the Court of Appeals 27 August 2021 Order must be filed by Monday, 13 September 2021 addressing the legal question of whether North Carolina courts have subject matter jurisdiction under the provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), N.C.G.S. § 50A-101. Any response or responses to such petition or petitions must be filed by Monday, 20 September 2021.

By order of the Court in Conference, this the 3rd day of September, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of September, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk, Supreme Court of North Carolina

ALDEN v. OSBORNE

[379 N.C. 123 (2021)]

ALDEN	)	
	)	
v.	)	Alleghany County
	)	
OSBORNE	)	

No. 326P21

ORDER

The Alleghany County Department of Social Services' petition for discretionary review and motion to amend or supplement its petition for discretionary review are allowed. The order of the Court of Appeals entered on 27 August 2021 allowing respondent-mother's petition deemed a petition for writ of certiorari is vacated. The matter is remanded to the District Court, Alleghany County for further proceedings.

By order of the Court in Conference, this the 24th day of September, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of September, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

JONATHAN H. BYNUM	)	
	)	
v.	)	LINCOLN COUNTY
	)	
DISTRICT ATTORNEY OF LINCOLN COUNTY, REGISTER OF DEEDS DANNY HESTER, FIFTH THIRD BANK, LINCOLNTON, NC 28092, REGISTER OF DEEDS PENNY SHERILL, REGISTER OF DEEDS AMANDA VINSON	)	

No. 43P18-2

ORDER

Defendant's motions for relief filed on 10 August 2021 are dismissed.

By order of this Court in Conference, this 27th day of October, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of October, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; AND SHAKITA NORMAN	)	
v.	)	WAKE COUNTY
TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS FFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; KENNETH RAYMOND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAVID C. BLACK, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS	)	

No. 331P21-1

ORDER

On Plaintiffs' Petition for a Writ of Supersedeas and Emergency Motion for a Temporary Stay, this Court orders that the status quo be preserved pending defendant's appeal of the expanded preliminary injunction issued initially by the trial court on 23 August 2021 in open court by maintaining in effect the original preliminary injunction issued on 4 September 2020 as it was understood at the time and implemented for the November 2020 elections. Further, the Court orders that the Court of Appeals stay issued 3 September 2021 be implemented prospectively

only, meaning that any person who registered to vote at a time when it was legal for that person to register under then-valid court orders as they were interpreted at the time, shall remain legally registered voters. The North Carolina Board of Elections shall not remove from the voter registration database any person legally registered under the expanded preliminary injunction between 23 August 2021 and 3 September 2021, and those persons are legally registered voters until further Order.

In all other respects, Plaintiffs' Petition for a Writ of Supersedeas and Emergency Motion for a Temporary Stay is denied without prejudice.

By order of the Court in conference, this the 10th day of September 2021.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of September 2021.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

FARMER v. TROY UNIV.

[379 N.C. 127 (2021)]

SHARELL FARMER	)	
	)	
v.	)	Cumberland County
	)	
TROY UNIVERSITY, PAMELA GAINEY, AND KAREN TILLERY	)	

No. 457P19-2

ORDER

Plaintiff's petition for discretionary review is decided as follows: Allowed as to Issue Nos. 1 and 2; denied as to Issue Nos. 3 and 4.

By order of the Court in conference, this the 27th day of October 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

IN RE S.C.L.R.

[379 N.C. 128 (2021)]

IN RE	)	
	)	Cleveland County
S.C.L.R.	)	

No. 371A20

ORDER

The Court, acting on its own motion, amends the record on appeal that was filed in this case by including the Complaint, dated 15 May 2017; Acceptance of Service by Jessica Lynn Maloney, dated 15 May 2017; Acceptance of Service by Christopher Lee Reeves, dated 15 May 2017; Order, dated 15 May 2017; and Custody Order, dated 27 June 2019, from Cleveland County File No. 17-CVD-814, pursuant to Rule 9(b)(5)(b) of the North Carolina Rules of Appellate Procedure. These documents are needed in order for the Court to make an informed decision in this matter.

By order of the Court in Conference, this 25th day of August 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, JAMES D. WILSON, BENJAMINE E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED	)	
v.	)	Gaston County
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA	)	

No. 436PA13-4

ORDER

In light of the quorum requirement contained in N.C.G.S. § 7A-10(a) and the fact that a majority of the members of the Court are potentially disqualified from participating in the hearing and decision of this case pursuant to Canon 3(C)(1)(c) of the Code of Judicial Conduct on the grounds that one or more persons within the third degree of kinship by either blood or marriage not residing in their households could be a member of the plaintiff class, the Court hereby exercises its discretion to invoke the Rule of Necessity and will proceed to set this case for argument and decision. This decision rests upon the following

considerations: (1) the significance of this case to the citizens of North Carolina arising from the large number of potential class members, (2) the potential impact of any decision that the Court might make in this case upon the public fisc, (3) the likelihood that the Court's decision will provide further guidance concerning the extent of the General Assembly's authority to modify the terms and conditions of State employment, and (4) the importance of fulfilling the Court's duty under Article IV of the Constitution of North Carolina to resolve a matter properly presented for its consideration, *see United States v. Will*, 449 U.S. 200, 214 (1980) (stating that "[i]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated"); *see also Boyce & Isley, PLLC v. Cooper*, 357 N.C. 655, 656–57 (2003) (invoking the Rule of Necessity in order to permit the making of a decision to grant or deny a petition for discretionary review in an important case by more than a bare quorum of the Court); *Bacon v. Lee*, 353 N.C. 696, 717–18 (2001) (holding that the Governor of North Carolina was permitted to consider death row clemency petitions despite the Governor's prior tenure as Attorney General); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922) (determining that the Court must hear a case challenging the application of a statewide income tax to judicial salaries despite the potential impact of that case upon the members of the Court).

The Court further determines that the invocation of the Rule of Necessity will not violate the due process rights of any party to this proceeding. This order is subject to the right of each individual member of the Court to recuse himself or herself from further participation in this matter on his or own initiative pursuant to Canon 3D of the North Carolina Code of Judicial Conduct if additional facts warrant the exercise of such discretion.

By order of the Court in conference, this the 18th day of August 2021.

s/Berger, J.
For the Court

Chief Justice Newby did not participate in the consideration or decision of this matter.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of August 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE	)	
v.	)	Wake County
TIM MOORE, IN HIS OFFICIAL CAPACITY, PHILIP BERGER, IN HIS OFFICIAL CAPACITY	)	

No. 261A18-3

ORDER

The Court, on its own motion, authorizes the parties to file simultaneous supplemental briefs and reply briefs addressing the question of the procedure that the Court should implement in considering a recusal motion, including some or all the following issues and any additional procedure-related issues that any party deems appropriate:

1. What historical and current recusal practices are utilized by state and federal courts of last resort in the United States? To the extent that another state's court of last resort has rules allowing the involuntary recusal of a justice who does not believe that his or her self-recusal would be appropriate, upon what authority were those rules predicated and what process was used to adopt them? Does the recusal process differ between state and federal courts of last resort and, if so, why?

2. Does this Court have the authority to require the involuntary recusal of a justice who does not believe that self-recusal is appropriate? If so, upon what legal principles does that authority rest? What role, if any, do N.C.G.S. § 7A-10 and N.C.G.S. § 7A-10.1 play in determining whether this Court has such authority? What role do the provisions of the Code of Judicial Conduct play in the making of any such recusal decision? And what enforcement mechanisms exist to ensure compliance with any such involuntary recusal decision?

3. What has been the method for making recusal decisions by this Court? What should be the procedures employed in making recusal decisions for members of this Court?

4. Are there any differences in the principles to be utilized in determining whether a justice of a court of last resort

should be recused and those governing the recusal of a judicial official serving as a member of a trial court or lower appellate court?

5. What, if any, effect should the filing of a motion that a particular justice be recused have upon the process followed in making the recusal decision? Should any distinction be made in the handling of recusal motions predicated upon constitutional and non-constitutional grounds? Should the justice who is the subject of the recusal motion participate in the determination of that motion by the full court and, if so, on what authority?

6. What effect should any "duty to sit" have in the process of deciding whether a justice of a court of last resort should be recused? Does the fact that a justice of a state court of last resort is elected, rather than appointed, have any bearing upon the recusal analysis? Does an elected justice have an individual constitutional right to participate in deciding every case that comes before the Court and, if so, what is the source and extent of any such right? Does the involuntary recusal of a justice have any impact upon the constitutional or statutory rights of any party to the underlying case?

7. Should written rules be adopted to govern the recusal of a member of this Court who elects to refrain from recusing himself or herself? If so, what entity should adopt any such rules? And what should be the content of those rules?

8. Should any such rules incorporate a process for the making of findings of fact? If so, what person or entity should make those findings and what procedures should be employed in order to facilitate the making of any such findings? What should be the standard of proof utilized in making those findings of fact? And what burden of proof, if any, is applicable to the fact-finding process and who bears it?

Each party's initial brief should be filed no later than 30 days from the date of the entry of this order. Any response brief that a party wishes to submit should be filed no later than 20 days after the deadline for the filing of initial briefs. After both initial and response briefs have been filed, the Court will decide the extent, if any, to which additional procedural steps need to be taken prior to the resolution of the recusal motions that are currently pending before this Court.

By order of the Court in conference, this the 28th day of September 2021.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of September 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney

M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

RADIATOR SPECIALTY CO. v. ARROWOOD INDEM. CO.

[379 N.C. 135 (2021)]

RADIATOR SPECIALTY COMPANY	)	
	)	
v.	)	Mecklenburg County
	)	
ARROWOOD INDEMNITY COMPANY, ET AL.	)	

No. 20PA21

ORDER

The parties' joint motion to file appellant, appellee, and reply briefs under seal is allowed as follows: The parties are ordered to file briefs under seal in compliance with all applicable deadlines, and, in addition, to file unsealed briefs within seven (7) days of the filing of the sealed briefs. In the unsealed briefs, the parties are only permitted to redact information contained within or descriptive of information contained within privileged attorney-client communications between RSC and its defense counsel in underlying personal injury cases in which certain of the Insurers have a duty to defend RSC under the insurance policies at issue. Pursuant to Rule 42(a) of the North Carolina Rules of Appellate Procedure, items sealed in the trial court in this matter remain under seal in this Court.

By order of the Court in Conference, this the 1st day of October, 2021.

Berger, J. recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of October 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wayne County
	)	
PAUL ANTHONY BROWN	)	

No. 145A02-3

ORDER

Defendant's Unopposed Motion to Unseal is decided as follows: In light of the fact that the Court has not, after a diligent search of its records, been able to locate a copy of the *ex parte* motion that defendant seeks to have unsealed, defendant's motion is dismissed without prejudice.

By order of the Court in conference, this the 12th day of October 2021.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistan~~t Clerk, Supreme Court of
North Carolina

STATE v. DIAZ-TOMAS

[379 N.C. 137 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	WAKE COUNTY
	)	
ROGELIO ALBINO DIAZ-TOMAS	)	
	)	
and	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	
EDGARDO G. NUNEZ	)	

No. 54A19-3 (consolidated with No. 255PA20)

AMENDED ORDER

The above-captioned two cases were consolidated by order of the Court on 30 June 2020. Defendant Nunez now moves this Court to unconsolidate these cases for oral argument or, in the alternative, to extend time for oral argument. Defendant's alternative motion to extend time is allowed as follows: the time for oral argument will be extended both for the defendant-appellants collectively, and for the State, to forty-five minutes for each side pursuant to North Carolina Rule of Appellate Procedure 30(b). The defendant-appellants' collective total of forty-five minutes for oral argument, including main argument and rebuttal, shall be divided equally between the two defendant-appellants unless they agree otherwise. Defendant's motion is otherwise denied.

Justice BERGER is not participating in the consideration or decision of this case.

By order of this Court in Conference, this 4th day of October, 2021.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of October 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
ROBERT LEE HODGE	)	

No. 134A20

ORDER

In light of the additional findings of fact which were filed on 4 August 2021 by the Superior Court, Wake County in the above-captioned case in timely response to the questions tendered to the trial court in an order of this Court issued on 5 May 2021, wherein the trial court determined that:

1) Yes, there was a true bill for habitual felon indictment dated 7 November 2017;

2) Yes, pursuant to N.C.G.S. § 15A-628(c), the true bill was returned by the foreman of the grand jury to the presiding judge in open court;

3) Yes, pursuant to N.C.G.S. § 15A-628(d), the clerk did keep a permanent record of the true bill along with all matters returned by the grand jury to the judge; and

4) Yes, defendant was properly served with the true bill,

the Court concludes that the record in this case has been duly supplemented by these additional findings of fact, and therefore remands this case to the Court of Appeals for the limited purpose of reevaluating the opinion of the Court of Appeals in this case in light of the additional findings of fact which were not available for consideration by the Court of Appeals at the time of the issuance of its opinion. Consequently, it is further ordered that defendant-appellant's Motion for Supplemental Briefing filed in this Court on 11 August 2021 is deemed to be moot.

By order of the Court in Conference, this the 27th day of August, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of August, 2021.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

29 OCTOBER 2021

12P21	State v. John Anton Parulski	Def's PDR Under N.C.G.S. § 7A-31 (COA19-673)	Denied
13P21	State v. Wallace Bradsher	1. Def's Motion for Temporary Stay (COA19-365) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Petition for Writ of Supersedeas 5. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/11/2021** Dissolved **10/27/2021** 2. Denied 3. Denied 4. Allowed 5. Allowed **Berger, J., recused**
20PA21	Radiator Specialty Company v. Arrowood Indemnity Company (as Successor to Guaranty National Insurance Company, Royal Indemnity Company, and Royal Indemnity Company of America); Columbia Casualty Company; Continental Casualty Company; Fireman's Fund Insurance Company; Insurance Company of North America; Landmark American Insurance Company; Munich Reinsurance America, Inc., (as Successor to American Reinsurance Company); Mutual Fire, Marine and Inland Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Pacific Employers Insurance Company; St. Paul Surplus Lines Insurance Company; Sirius America Insurance Company	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-507) 2. Def's (Fireman's Fund Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Defs' (Landmark American Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and Zurich American Insurance Company of Illinois) Conditional PDR Under N.C.G.S. § 7A-31 4. Defs' (Landmark American Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and Zurich American Insurance Company of Illinois) Conditional PDR Under N.C.G.S. § 7A-31 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31 6. Plt and Defs' Joint Motion to Set Briefing Schedule 7. Def's (Landmark American Insurance Company) Motion to Admit Stephen M. Green Pro Hac Vice 8. Def's (Landmark American Insurance Company) Motion to Admit David A. Tartaglio Pro Hac Vice 9. Def's (Landmark American Insurance Company) Motion to Admit Steven T. Adams Pro Hac Vice 10. Def's (National Union Fire Insurance Company of Pittsburgh, PA) Motion to Admit Mark J. Sobczak Pro Hac Vice	1. Allowed **08/10/2021** 2. Allowed **08/10/2021** 3. Allowed **08/10/2021** 4. Allowed **08/10/2021** 5. Allowed **08/10/2021** 6. Allowed **09/01/2021** 7. Allowed **09/17/2021** 8. Allowed **09/17/2021** 9. Allowed **09/17/2021** 10. Allowed **09/30/2021**

	(as Successor to Imperial Casualty and Indemnity Company); United National Insurance Company; Westchester Fire Insurance Company; Zurich American Insurance Company of Illinois	11. Def's (National Union Fire Insurance Company of Pittsburgh, PA) Motion to Admit Matthew J. Fink Pro Hac Vice	11. Allowed **09/30/2021**
		12. Parties' Joint Motion to File Briefs Under Seal	12. Special Order **10/01/2021**
		13. Amicus Curiae (Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association) Motion to Admit Laura A. Foggan Pro Hac Vice	13. Allowed **10/01/2021**
		14. Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association's Motion for Leave to File Amicus Brief	14. Allowed **10/04/2021**
		15. Plt's Motion to Admit Catherine J. Del Prete Pro Hac Vice	15. Allowed **10/06/2021**
		16. Plt's Motion for Brief to be Deemed Timely	16. Allowed **10/06/2021**
		17. Def's (National Union Fire Insurance Company of Pittsburgh, PA) Motion to File Amended/Corrected Brief and Deem it Timely Filed	17. Allowed **10/07/2021**
		18. Plt's and Defendant's (Zurich American Insurance Company of Illinois) Joint Motion to Dismiss Party	18. Allowed **10/15/2021** **Berger, J., recused**
22A21	Mace, et al. v. Utley, et al.	Def's Consent Motion to Withdraw Appeal (COA19-726)	Allowed **09/27/2021**
23A21	State v. Darrell Tristan Anderson	Def's Motion to Share Argument Time with Amicus Curiae	Allowed **10/12/2021**
42P04-12	State v. Larry McLeod Pulley	1. Def's Pro Se Motion for Relief	1. Dismissed
		2. Def's Pro Se Motion for Writ of Coram Nobis	2. Dismissed
		3. Def's Pro Se Motion to Amend	3. Dismissed as moot
		4. Def's Pro Se Motion to Consider Newly Found Evidence	4. Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

29 OCTOBER 2021

43P18-2	Jonathan H. Bynum v. District Attorney of Lincoln County, Register of Deeds Danny Hester, Fifth Third Bank, Lincolnton, NC 28092, Register of Deeds Penny Sherill, Register of Deeds Amanda Vinson	1. Plt's Pro Se Motion for Class Action	1. Special Order
		2. Plt's Pro Se Motion to Counterclaim	2. Special Order
		3. Plt's Pro Se Motion to Dismiss	3. Special Order
		4. Plt's Pro Se Motion for Conversion	4. Special Order
		5. Plt's Pro Se Amended Motion for Defamation Torts	5. Special Order
		6. Plt's Pro Se Motion for Agent or Attorney Fees	6. Special Order
		7. Plt's Pro Se Motion to Proceed as a Veteran	7. Special Order
		8. Plt's Pro Se Motion for Class Action	8. Special Order
		9. Plt's Pro Se Motion for Conversion	9. Special Order
		10. Plt's Pro Se Motion to Counterclaim	10. Special Order
		11. Plt's Pro Se Motion for Defamation	11. Special Order
		12. Plt's Pro Se Motion for Agent or Attorney Fees	12. Special Order
		13. Plt's Pro Se Motion to Proceed as a Veteran	13. Special Order
		14. Plt's Pro Se Motion for Class Action	14. Special Order
		15. Plt's Pro Se Motion for Discrimination	15. Special Order
		16. Plt's Pro Se Motion for Defamation	16. Special Order
		17. Plt's Pro Se Motion for Civil Rights Violation	17. Special Order
		18. Plt's Pro Se Motion for Agent or Attorney Fees	18. Special Order
		19. Plt's Pro Se Motion to Proceed as a Veteran	19. Special Order
		20. Plt's Pro Se Motion for Amended Class Action	20. Special Order
		21. Plt's Pro Se Motion to File a Complaint	21. Special Order

		22. Plt's Pro Se Motion for Violation Rerecord in Satisfaction Security Instrument	22. Special Order
		23. Plt's Pro Se Motion for Conversion	23. Special Order
		24. Plt's Pro Se Motion for Agent or Attorney Fees	24. Special Order
		25. Plt's Pro Se Motion to Proceed as a Veteran	25. Special Order
		26. Plt's Pro Se Motion for Amended Class Action	26. Special Order
		27. Plt's Pro Se Motion to File Complaint Conduct Unbecoming	27. Special Order
		28. Plt's Pro Se Motion for Conversion	28. Special Order
		29. Plt's Pro Se Motion to Proceed as a Veteran	29. Special Order
44P21-4	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Immediate Hearing	Dismissed
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay (COA19-777 P19-490)	1. Allowed **04/21/2020**
		2. Def's Petition for Writ of Supersedeas	2. Allowed **06/03/2020**
		3. Def's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR as to Additional Issues	4. Special Order **12/15/2020**
		5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA	5. Allowed **12/15/2020**
		6. Def's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County	6. Allowed **12/15/2020**
		7. Def's Conditional Petition for Writ of Mandamus	7.
		8. Def's Motion to Expedite the Consideration of Defendant's Matters	8. Dismissed as moot **12/15/2020**
		9. Def's Motion to Proceed *In Forma Pauperis*	9. Allowed **12/15/2020**
		10. Def's Motion to Take Judicial Notice	10. Dismissed as moot **12/15/2020**

		11. Def's Motion for Leave to Amend Notice of Appeal	11. Allowed **12/15/2020**
		12. Def's Motion for Summary Reversal	12. Dismissed **12/15/2020**
		13. Def's Motion to Supplement Record on Appeal	13. Allowed **12/15/2020**
		14. Def's Motion to Consolidate Diaz-Tomas and Nunez Matters	14. Allowed **06/30/2020**
		15. Def's Motion to Clarify the Extent of Supersedeas Order	15. Dismissed **12/15/2020**
		16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance	16. Allowed **12/15/2020**
		17. Def's Motion to File Memorandum of Additional Authority	17. Dismissed **07/08/2020**
		18. Def's Motion for Petition for Writ of Procedendo	18. Dismissed **12/15/2020**
		19. Def's Motion for Printing and Mailing of PDR on Additional Issues	19. Dismissed **12/15/2020**
		20. Def's Motion for the Production of Discovery Under Seal	20. Denied **12/15/2020**
		21. Def's Motion to Amend Certificate of Service	21. Allowed **12/15/2020**
		22. Def's Motion to Amend Motion for Petition for Writ of Procedendo	22. Dismissed as moot **12/15/2020**
		23. Def's Motion to Unconsolidate Cases for Oral Argument	23. Special Order **10/04/2021**
		24. The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	24. Allowed **03/02/2021** **Berger, J., recused**
66P21	Pia Townes v. Portfolio Recovery Associates, LLC	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-78)	1. Allowed
		2. North Carolina Creditors Bar Association's Motion for Leave to File Amicus Brief in Support of Petition for Discretionary Review	2. Dismissed as moot
		3. North Carolina Creditors Bar Association's Conditional Motion for Leave to File Amicus Brief	3. Allowed
		4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	4. Allowed **Ervin, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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72P21	Guy Ferrante v. Judge W. David McFadyen	1. Petitioner's Pro Se Motion for Notice of Appeal (COAP20-612) 2. Petitioner's Pro Se Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
86P21	Thomas M. Anderson, Perry Polsinelli, Dori Danielson, William Hannah, Deborah Hannah, Richard F. Hunter, Andrew Juby, Thomas T. Schreiber, Fred R. Yates and wife, Karon K. Yates, individually and on behalf of Mystic Lands Property Owners Association, a North Carolina Non-profit Corporation v. Mystic Lands, Inc., a Florida Corporation and Ami Shinitzky	1. Defs' Motion for Temporary Stay (COA19-801) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Defs' Motion to Amend PDR 5. Defs' Motion to Strike Portions of Plaintiffs' Response	1. Allowed **02/26/2021** Dissolved **10/27/2021** 2. Denied 3. Denied 4. Allowed **02/26/2021** 5. Dismissed as moot **Berger, J., recused**
87P21	Thomas M. Anderson, Perry Polsinelli, Dori Danielson, William Hannah, Deborah Hannah, Richard F. Hunter, Andrew Juby, Thomas T. Schreiber, Fred R. Yates and wife, Karon K. Yates, individually and on behalf of Mystic Lands Property Owners Association, a North Carolina Non-profit Corporation v. Mystic Lands, Inc., a Florida Corporation and Ami Shinitzky	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA19-802) 2. Defs' Motion to Strike Portions of Plaintiffs' Response	1. Denied 2. Dismissed as moot **Berger, J., recused**
92A21	State v. Abdul Haneef Abdullah	Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-867)	Dismissed *ex mero motu*
94P20-2	State v. Carlton Lashawn White	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/08/2021**
94P20-3	State v. Carlton Lashawn White	Def's Pro Se Motion for Notice of Denial of Writ of Habeas Corpus	Dismissed **10/26/2021**

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104P21	Molly Schwarz v. Thomas J. Weber, Jr., D.O.	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1164)	Denied
105P20-3	State v. Matthew Joseph Taylor	Def's Pro Se Motion to Strike a Prior Conviction (COA19-593)	Dismissed
119P21	State v. Maderkis Deyawn Rollinson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-42) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Review as a Petition for Writ of Certiorari 4. Def's Motion for Temporary Stay 5. Def's Petition for Writ of Supersedeas	1. Allowed 2. Allowed 3. Dismissed as moot 4. Allowed **04/08/2021** 5. Allowed
128P21-2	State v. Richard L. Hefner	1. Def's Pro Se Motion for PDR 2. Def's Petition for Writ of Habeas Corpus	1. Denied **09/20/2021** 2. Denied **09/20/2021**
129A96-3	State v. Carlton Eugene Anderson	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Jackson County	Denied **09/22/2021**
131P01-18	State v. Anthony Dove	1. Def's Pro Se Motion to Proceed *In Forma Pauperis* 2. Def's Pro Se Petition for Writ of Mandamus	1. Allowed 2. Denied **Ervin, J., recused**
131P16-21	State v. Somchai Noonsab	1. Def's Pro Se Motion for Lawsuit (COAP16-103) 2. Def's Pro Se Motion for Jurisdiction and to Take Judicial Notice 3. Def's Pro Se Motion for Jurisdiction of Same Elements	1. Dismissed 2. Dismissed 3. Dismissed

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132PA21	In the Matter of J.N. & L.N.	1. Respondent-Father's Notice of Appeal Based Upon a Constitutional Question (COA20-296) 2. Respondent-Father's PDR Under N.C.G.S. § 7A-31 3. Guardian ad Litem's Motion to Dismiss Appeal 4. Petitioner's Motion to Dismiss Appeal 5. Respondent-Father's Motion to Amend PDR	1. --- 2. Allowed **08/10/2021** 3. Allowed **08/10/2021** 4. Allowed **08/10/2021** 5. Allowed **08/10/2021**
133PA21	State v. Matthew Benner	State's Motion for Oral Argument to be Heard via Webex and Not in Person (COA19-879)	Denied **10/19/2021**
134A20	State v. Robert Lee Hodge	Def's Motion for Supplemental Briefing (COA19-443)	Special Order **08/27/2021**
145A02-3	State v. Paul Anthony Brown	Def's Motion to Unseal	Special Order **10/12/2021**
151PA18-2	State v. Ramar Dion Benjamin Crump	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **09/07/2021**
153P21	In the Matter of S.M., Jr	1. State's Motion for Temporary Stay (COA20-871) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/07/2021** Dissolved **10/27/2021** 2. Denied 3. Denied
156A17-3	Christopher DiCesare, James Little, and Diana Stone, individually and on behalf of all others similarly situated v. the Charlotte-Mecklenburg Hospital Authority, d/b/a/ Carolinas Healthcare System	1. Plts' Petition for Writ of Mandamus 2. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of Business Court 3. Plts' Motion to Admit Adam Gitlin, Brendan P. Glackin, Miriam E. Marks, Daniel E. Seltz, and Benjamin E. Shiftan Pro Hac Vice 4. Plts' Motion for Limited Remand 5. Def's Motion to Dismiss Appeal	1. Dismissed as moot 2. Dismissed as moot 3. Allowed 4. Dismissed as moot 5. Allowed **06/15/2021**

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156A17-4	Christopher DiCesare, James Little, and Diana Stone, individually and on behalf of all others similarly situated v. the Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System	1. Def's Motion to Dismiss Appeal 2. Plt's Plaintiffs' Motion for Extension of Time to File Response 3. Plt's Motion to Admit Adam Gitlin, Brendan P. Glackin, Miriam E. Marks, Daniel E. Seltz, and Benjamin E. Shiftan Pro Hac Vice 4. Def's Joint Motion to Extend Time and Set Briefing Schedule	1. Dismissed as moot 2. Allowed **08/20/2021** 3. Allowed **09/22/2021** 4. Allowed **09/17/2021**
157P21	State v. Christopher Baldwin	Def's PDR Under N.C.G.S. § 7A-31 (COA20-17)	Denied
158P16-3	State v. Larry Brandon Moore	1. Def's Pro Se Petition for Writ of Certiorari 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
163A21	Murphy-Brown, LLC and Smithfield Foods, Inc. v. ACE American Insurance Company; ACE Property & Casualty Insurance Company; American Guarantee & Liability Insurance Company; Great American Insurance Company of New York; Old Republic Insurance Company; XL Insurance America, Inc.; and XL Specialty Insurance Company	1. Plt's Motion to Dismiss Appeal 2. Defs' (ACE American Insurance Company) Motion for Extension of Time to File Reply Brief 3. Def's (Old Republic Insurance Company) Motion for Extension of Time to File Reply Brief 4. Defs' (Old Republic Insurance Company and ACE American Insurance Company) Motion for Extension of Time to File Response to Motion to Dismiss 5. Def's (Old Republic Insurance Company) Motion to Dismiss Appeal as Settled	1. Allowed 2. Allowed **09/03/2021** 3. Allowed **09/07/2021** 4. Allowed **09/07/202** 5. Allowed **10/06/2021**
165A21	Rocky DeWalt, Robert Parham, Anthony McGee, and Shawn Bonnett, Individually and on Behalf of a class of similarly situated Persons v. Erik A. Hooks, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the North Carolina Department of Public Safety	Amicus Curiae's Motion to Withdraw and Substitute Counsel	Allowed **10/01/2021**

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166A21	In the Matter of J.C. and D.C.	1. Petitioner's Motion for Leave to File a Motion to Correct the March 29, 2021 Order in the District Court 2. Petitioner's Motion to Stay Briefing in this Matter Until the Court's Order of March 29, 2021 can be Corrected and the Record on Appeal Supplemented with a Corrected Copy of the Order	1. 2. Denied **09/29/2021**
178P21	Lisa Howze as Administratrix of the Estate of Palestine Howze v. Treyburn Rehabilitation Center, LLC d/b/a Treyburn Rehabilitation Center; Southern Healthcare Management, LLC; 2059, LLC; Sovereign Healthcare Holdings, LLC	Plt's PDR Prior to a Determination by the COA (COA21-272)	Denied
183P21	State v. Brian Thad Carver	Def's PDR Under N.C.G.S. § 7A-31 (COA19-555)	Denied
185P21	State v. Ricardo Solis Garcia	Def's PDR Under N.C.G.S. § 7A-31 (COA20-380)	Denied
191A21	In the Matter of K.Q.	1. Guardian ad Litem's Motion to Dismiss Appeal 2. Respondent-Mother's Motion to Supplement the Record on Appeal	1. Allowed **09/14/2021** 2. Dismissed as moot **10/21/2021**
192P21	Alejandro Asbun v. North Carolina Department of Health and Human Services	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA20-346) 2. Petitioner's Pro Se Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
194P21	State v. Jeffery Lee Sechrest	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-256) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed

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197PA20-2	State v. Jeremy Johnson	1. Def's Motion for Temporary Stay (COA19-529-2) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/20/2021** 2. Allowed 3. Allowed **Berger, J., recused**
207A21	In the Matter of E.D.H.	Guardian ad Litem's Motion to File Amended Brief	Allowed **09/01/2021**
212P21-2	State v. Milton E. Lancaster	Def's Pro Se Motion for Review	Dismissed
216A21	In the Matter of L.Z.S.	1. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Chowan County 2. Guardian ad Litem's Motion to Dismiss Appeal 3. Petitioner's Motion to Dismiss Appeal 4. Petitioner and Guardian ad Litem's Motion to Temporarily Stay the Filing of the Briefs	1. Allowed **09/13/2021** 2. 3. 4. Allowed **09/13/2021**
226P06-3	State v. De'Norris L. Sanders	Def's Petition for Writ of Habeas Corpus	Denied **09/28/2021**
229P21-2	State v. Anthony Moses Arnold	Def's Pro Se Motion to Dismiss Charges and Drop POV	Dismissed
240P21	In the Matter of the Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. v. Martin E. Rock a/k/a Martin A. Rock Lien Dated: October 23, 2018 Lien Recorded 18 M 1195 In the Clerk's Office, Durham County Courthouse	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-405) 2. Respondent's Motion to Dismiss PDR 3. Petitioner's Motion for Temporary Stay 4. Petitioner's Petition for Writ of Supersedeas 5. Respondent's Motion that Petitioner be Taxed Costs or Fines 6. Respondent's Petition for Writ of Mandamus 7. Respondent's Motion in the Alternative for Order Directing the Durham County Clerk of Superior Court to Set a Hearing as to the Release of Appeal Bond	1. 2. 3. Allowed **09/01/2021** 4. 5. 6. Denied **10/06/2021** 7. Denied **10/06/2021**
242P21	State v. Danny William Young	Def's Pro Se Motion for Appropriate Relief	Dismissed

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246PA21	State v. James Gregory Medlin	1. Def's Petition for Writ of Supersedeas (COA20-563) 2. Def's Notice of Appeal Based Upon a Dissent 3. Def's Motion to Deem Notice of Appeal Timely Served 4. Def's Petition for Writ of Certiorari to Review Decision of the COA 5. Def's Motion to Maintain the Stay	1. Allowed **09/01/2021** 2. Dismissed as moot **09/01/2021** 3. Dismissed as moot **09/01/2021** 4. Allowed **09/01/2021** 5. Dismissed as moot **09/01/2021**
253P19-3	State v. Justin Michael Tyson	1. Def's Pro Se Motion to Dismiss the Indictment (COAP18-739) 2. Def's Pro Se Motion to Quash the Indictment, Dismiss Charges, and Reverse the Decision of the COA 3. Def's Pro Se Motion for Relief from Judgment or Order	1. Dismissed 2. Dismissed 3. Dismissed
254P18-6	State v. Jimmy A. Sevilla-Briones	Def's Pro Se Motion for Petition for Direct Review (COAP17-645)	Denied
255PA20	State v. Edgardo Gandarillo Nunez	Def's Motion to Un-Consolidate Cases for Oral Argument (COA20-202)	Special Order **08/31/2021** **Berger, J., recused**
257P21	State v. Maribel Gonzalez	1. Def's Motion for Temporary Stay (COA20-390) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/21/2021** Dissolved **10/27/2021** 2. Denied 3. Denied
258P21	Richard P. Meabon v. Michael K. Elliott; Elliott Law Firm, PC	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-559)	Denied
260A20	State v. Marc Peterson Oldroyd	1. Notice of Appeal Based Upon a Dissent (COA19-595) 2. State's Motion to Withdraw Appearance of Heyward Earnhardt	1. --- 2. Allowed **09/16/2021**

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261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	1. Plt's Motion to Disqualify Justice Barringer and Justice Berger 2. Def's Motion for Extension of Time to File Briefs	1. 2. Allowed **10/25/2021**
262P21	In re Joseph Gibson, III	1. Petitioner's Pro Se Petition for Writ of Certiorari (COAP21-223) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
270A18-2	State v. Thomas Earl Griffin	Def's Motion for Leave to File Supplemental New Brief	Denied **10/26/2021**
272A14	State v. Jonathan Douglas Richardson	1. Def's Motion to Bypass Court of Appeals 2. Def's Motion for Order Amending Record on Appeal	1. Allowed **02/24/2021** 2. Allowed
272P21	State v. Paul Kevin Flint	Def's Pro Se Motion for Phone Records	Dismissed
273A21	In the Matter of V.D.M. and A.D.M.	1. Respondent-Mother's Motion to Dismiss Appeal 2. Respondent-Mother's Motion to Waive Costs	1. Allowed **09/14/2021** 2. Allowed **09/14/2021**
276A21	State v. Michael Steven Elder	1. State's Motion for Temporary Stay (COA20-215) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Hold Appeal in Abeyance	1. Allowed **08/05/2021** 2. Allowed **08/24/2021** 3. --- 4. Allowed **09/28/2021**
279A20-2	State v. Demon Hamer	Def's Pro Se Motion to Reconsider	Denied
279A21	In the Matter of E.M.D.Y.	1. Respondent's Motion for Temporary Stay (COA20-685) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent and State's Joint Motion to Hold Appeal in Abeyance	1. Allowed **08/06/2021** 2. Allowed **08/24/2021** 3. Allowed **09/21/2021**

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280P21	Travis Wayne Baxter v. Roy Cooper, USA Attorney, Leo Act	1. Plt's Pro Se Motion for New Complaint *In Forma Pauperis* 2. Plt's Pro Se Motion to Order the Paying of $33,000 3. Plt's Pro Se Motion for Petition Payment Demand 4. Plt's Pro Se Motion for Petition Payment Demand	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
281P21	Robert M. Pedlow v. Timothy Kornegay	Def's PDR Under N.C.G.S. § 7A-31 (COA20-747)	Denied
282P21	State v. Timothy Leon Moore	Def's PDR Under N.C.G.S. § 7A-31 (COA20-53)	Denied
283P21-1	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., Amrit Singh, Eleazar Rojas, and Shamsher Singh	1. Def's (Amrit Singh) Pro Se Motion for Notice of Appeal 2. Plt's Motion to Dismiss Appeal 3. Plt's Motion for Reconsideration 4. Plt's Motion to Strike	1. Dismissed **09/09/2021** 2. Dismissed as moot **09/09/2021** 3. Dismissed as moot **09/09/2021** 4. Dismissed as moot **09/09/2021**
283P21-2	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	Def's (Amrit Singh) Motion to Stay Proceedings	Dismissed **09/28/2021**
283P21-3	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	1. Def's (Amrit Singh) Pro se Motion to Dismiss Case 2. Def's (Amrit Singh) Pro se Motion to Supreme Court for the Investigation	1. Denied **10/04/2021** 2. Denied **10/04/2021**
283P21-4	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	Def's (Amrit Singh) Pro Se Motion for Appointment of Counsel	Dismissed as moot **10/07/2021**

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283P21-5	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	1. Def's (Amrit Singh) Pro Se Motion to Immediately Vacate the Case in the Lower Tribunal Superior Court	1. Dismissed **10/20/2021**
		2. Def's (Amrit Singh) Pro Se Motion to Restrain ATGI from Removing her from the Board of Directors of ATGI	2. Dismissed **10/20/2021**
		3. Def's (Amrit Singh) Pro Se Motion to Restrain ATGI from Using Any Shareholder Proxies Obtained Since March 2020	3. Dismissed **10/20/2021**
		4. Def's (Amrit Singh) Pro Se Motion to Restrain ATGI from Scheduling Any Shareholder Meetings for the Purposes of Removing Defendants from the ATGI Board of Directors During the Pendency of this Litigation	4. Dismissed **10/20/2021**
		5. Def's (Amrit Singh) Pro Se Motion for Reconsideration and to Reopen Discovery	5. Dismissed **10/20/2021**
		6. Def's (Amrit Singh) Pro Se Motion for Request to the Supreme Court and Honorable Judge with Respect and Loyalty	6. Dismissed **10/20/2021**
284P21	Wells Fargo Bank, N.A., as Trustee of the Jane Richardson McElhanney Revocable Trust, Wells Fargo Bank, N.A., as Trustee of the Samuel Clinton McElhaney Revocable Trust, and Wells Fargo Bank, N.A., as Executor of the Estate of Jane Richardson McElhaney v. Orsbon & Fenninger, LLP, and R. Anthony Orsbon	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA20-560)	1.
		2. Defs' Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	2.
		3. Defs' Motion to Withdraw PDR	3. Allowed **08/20/2021**
		4. Defs' Motion to Withdraw Petition for Writ of Certiorari	4. Allowed **08/20/2021**

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285P21	Jacob Samuel McElhaney and Julia Elizabeth McElhaney, as beneficiaries of the Jane Richardson McElhaney Revocable Trust and the Samuel Clinton McElhaney Revocable Trust v. Orsbon & Fenninger, LLP, and R. Anthony Orsbon	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA20-561) 2. Defs' Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 3. Defs' Motion to Withdraw PDR 4. Defs' Motion to Withdraw Petition for Writ of Certiorari	1. 2. 3. Allowed **08/20/2021** 4. Allowed **08/20/2021**
286A21	In the Matter of H.P., I.S., J.S.	1. Guardian ad Litem's Notice of Appeal Based Upon a Dissent (COA20-876) 2. Guardian ad Litem's Motion for Temporary Stay 3. Guardian ad Litem's Petition for Writ of Supersedeas 4. Respondent-Mother's Motion to Dissolve Temporary Stay and Petition for Writ of Supersedeas 5. Respondent-Mother's Motion to Dismiss Appeal	1. --- 2. Allowed **08/11/2021** 3. Allowed **08/11/2021** 4. Allowed **10/22/2021** 5. Allowed **10/22/2021**
289P21	State v. Brian Lorenzo Curlee	1. Def's Pro Se Motion for Notice of Appeal (COAP21-205) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed 3. Dismissed
292P21	Amanda C. Solomon, as Executrix of the Estate of Kent Anderson Cundiff v. Dawn Lorraine Cundiff	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-489)	Denied
294A21	State v. Harold Eugene Swindell	1. State's Motion for Temporary Stay (COA20-263) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/20/2021** 2. Allowed **09/08/2021** 3. --- 4.

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295P21	State v. D'Monte Lamont O'Kelly	1. State's Motion for Temporary Stay (COA20-693) 2. State's Petition for Writ of Supersedeas	1. Allowed **08/20/2021** 2.
296P21	In the Matter of Z.M.	Respondent-Mother's Pro Se Motion for Appeal	Dismissed
298A21	State v. David Myron Dover	1. State's Motion for Temporary Stay (COA20-362) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's Motion to Deem Brief Timely Filed	1. Allowed **08/24/2021** 2. Allowed **09/14/2021** 3. --- 4. Allowed **10/06/2021**
301P12-2	State v. Mark Bradley Carver	1. State's Motion for Temporary Stay (COA11-1382) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Sanctions	1. Allowed **05/11/2021** Dissolved **10/27/2021** 2. Denied 3. Denied 4. Denied
302A21	In the Matter of K.M.S.	Respondent-Father's Motion to Deem Brief Timely Filed	Allowed **10/06/2021**
304P20-4	Clyde Junior Meris v. Guilford County Sheriffs	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
305P97-10	State of North Carolina v. Egbert Francis, Jr.	Def's Pro Se Motion for Reconsideration of M.A.R.	Dismissed
308A21	In the Matter of C.G.	1. Respondent's Notice of Appeal Based Upon a Dissent (COA20-520) 2. Respondent's PDR as to Additional Issues	1. --- 2. Allowed
309A21	In the Matter of Q.J.	Respondent and State's Joint Motion to Hold Appeal in Abeyance	Allowed **09/21/2021**
312A21	In the Matter of C.G.F.	Respondent and State's Joint Motion to Hold Appeal in Abeyance	Allowed **09/21/2021**

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312PA18-2	State v. Aaron Lee Gordon	Def's Motion for Leave to File Supplemental New Brief	Denied **10/26/2021**
313A21	In the Matter of J.R.	Respondent and State's Joint Motion to Hold Appeal in Abeyance	Allowed **09/21/2021**
314P21	Paul Steven Wynn v. Rex Frederick, in his official capacity as a Magistrate, and Great American Insurance Company	Def's Motion to Withdraw Appearance of Heyward Earnhardt (COA20-472)	Allowed **09/16/2021**
315P21	Vanuzia de Moraes v. Simon Mayo Alemman	Plt's Pro Se Motion for Notice of Appeal	Dismissed
317A21	In the Matter of R.S.H.	1. Respondent's Notice of Appeal Based Upon a Dissent (COA20-777) 2. Respondent's PDR as to Additional Issues	1. --- 2. Allowed
322P21	State v. Adam McRee a/k/a Kevin Vaughn	Def's Pro Se Petition for Writ of Habeas Corpus (COAP21-329)	Denied **09/01/2021**
323P21	State v. Malik Jones	Def's Pro Se Motion for a Change of Venue	Dismissed **10/22/2021**
326P21	Christine Alden v. Lisa Osborne	1. Respondent's Motion for Temporary Stay (COAP21-200) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion to Amend or Supplement PDR	1. Allowed **08/31/2021** 2. Special Order **09/24/2021** 3. Special Order **09/24/2021** 4. Special Order **09/24/2021**
326P21-2	Christine Alden v. Lisa Osborne	1. Respondent's Motion for Temporary Stay (COAP21-200) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR 4. Petitioner's Pro Se Motion to Dismiss PDR, Petition for Writ of Supersedeas, and Motion for Temporary Stay for Lack of Standing	1. Allowed **10/05/2021** 2. Allowed 3. Allowed 4. Denied

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327P21	Joy Natasha Faucette Balom (formerly Burgess) v. Chaplain Dr. Ned Burgess, Jr.	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed **09/20/2021** 2. Dismissed **09/20/2021**
328A21	In the Matter of B.E.V.B.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Brunswick County	Allowed **10/13/2021**
329P21	State v. Robert Louis Staton	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA20-676)	Denied
330P21	State v. Cordero Deon Newborn	1. State's Motion for Temporary Stay (COA20-411) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/03/2021** 2. 3.
331PA20	Connette v. The Charlotte-Mecklenburg Hospital Authority, et al.	Plt's Motion to Allow Remote Oral Argument (COA19-354)	Allowed **10/14/2021** **Ervin, J., recused** **Berger, J., recused**
331P21	Community Success Initiative et al. v. Moore, et al.	1. Plts' Emergency Motion for Temporary Stay (COAP21-340) 2. Plts' Petition for Writ of Supersedeas 3. Legislative Defs' Motion to Admit David H. Thompson Pro Hac Vice 4. Legislative Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 5. Legislative Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 6. Legislative Defs' Motion to Admit William V. Bergstrom Pro Hac Vice 7. Plts' Motion for Leave to File Reply 8. Counsel for Plts' Motion to Withdraw as Counsel 9. Plts' Motion for Prompt Disqualification of Justice Berger, Jr.	1. Special Order **09/10/2021** 2. Special Order **09/10/2021** 3. Allowed **09/10/2021** 4. Allowed **09/10/2021** 5. Allowed **09/10/2021** 6. Allowed **09/10/2021** 7. Dismissed as moot **09/10/2021** 8. Allowed **09/10/2021** 9.

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		10. Plts' Plaintiffs' Motion in the Alternative for Deferred Disqualification Following the Court's Resolution of Plaintiffs' Petition for Writ of Supersedeas and Motion for Temporary Stay	10.
332A21	William J. Parra Angarita v. Marguerite Edwards	Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA20-846)	Dismissed *ex mero motu*
333A21	In the Matter of J.I.T.	Respondent-Father's Motion to Deem the Record on Appeal Timely Filed	Allowed **09/14/2021**
336P21	State v. Curtis Steven Pryor	Def's PDR Under N.C.G.S. § 7A-31 (COA20-363)	Denied
338P21	Lauri A. Nielson v. Raymond Schmoke	Def's PDR Under N.C.G.S. § 7A-31 (COA20-701)	Denied
339A18-2	The New Hanover County Board of Education v. Josh Stein, in his capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Intervenors Notice of Appeal Based Upon a Dissent 2. State's Notice of Appeal Based Upon a Dissent 3. Plt's Petition for Writ of Supersedeas	1. --- 2. --- 3. Denied **09/20/2021** **Berger, J., recused**
343P21	State v. Lee Anthony Brisbon	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-408) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
345P21	State v. Gilbert Lee King, Jr.	Def's Pro Se Motion for Violation of Due Process and Rights	Dismissed **09/14/2021**
346A21	In the Matter of N.F., Z.F., D.F., C.F.	Respondent-Father's Motion to Close Docket	Allowed **10/20/2021**
347A21	Public Service Company of North Carolina, Incorporated d/b/a Dominion Energy North Carolina v. Rita R. Thomas a/k/a Rita Rene Franklin	Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-200)	Dismissed

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350P21	State v. Joseph H. Shaw	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied **09/16/2021** 2. Denied **09/16/2021**
352P20	State v. Johnny Ringo Wallace	Def's PDR Under N.C.G.S. § 7A-31 (COA19-923)	Denied
353P21	State v. Travis Wayne Baxter	1. Def's Pro Se Motion for Notice of Appeal (COAP21-332) 2. State's Motion for Release of Documents Under Seal	1. Dismissed 2. Allowed
359A20	Bruce Allen Bartley v. City of High Point and Matt Blackman, in his official capacity as a Police Officer with the City of High Point, and Individually	1. Def's Notice of Appeal Based Upon a Dissent (COA19-1127) 2. Def's PDR as To Additional Issues) 3. Plt's Motion to Amend Response to Notice of Appeal Based on a Dissent and PDR	1. — 2. Denied **08/10/2021** 3. Allowed **08/19/2021**
359P21	Cheryl A. Groves v. Governor of North Carolina Roy Cooper	Petitioner's Pro Se Petition for Writ of Mandamus	Denied
360P21	State v. Daryl Lynn Sparks	1. Def's Pro Se Motion for PDR (COAP21-336) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **09/24/2021** 2. Denied **09/24/2021** 3. Dismissed as moot **09/24/2021**
362P21	Epes Logistics Services, Inc. v. Steen Marcuslund, Anthony De Piante, Jillian Caron, Brad Wiedner, Login Logistics, LLC, and Noble Worldwide Logistics, LLC	1. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) Motion for Temporary Stay (COA20-338) 2. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) Petition for Writ of Supersedeas 3. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) PDR	1. Allowed **09/27/2021** 2. 3.

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364P21	Thomasina Gean v. Mecklenburg County Schools, EEOC, Huntingtowne Farms Classroom Teachers Association	Plt's Pro Se Motion for Review and Judgement	Dismissed
371A20	In the Matter of S.C.L.R.	The Court's Motion to Amend the Record on Appeal	Special Order **08/25/2021**
383P20	Derek Hendricks v. N.C. Dept. of Justice, et al.	1. Petitioner's Pro Se Motion for Verified Complaint Jury Trial Demanded 2. Petitioner's Pro Se Motion for Order to Show Cause 3. Petitioner's Pro Se Motion for Judicial Intervention 4. Petitioner's Pro Se Motion for Fee Reduction/Waiver	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed as moot
388A10	State v. Andrew Darrin Ramseur	Def's Motion to Withdraw Andrew J. DeSimone as Counsel	Allowed **09/24/2021**
393P20	In the Matter of L.N.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA19-1020) 2. Respondent-Mother's Conditional PDR Under N.C.G.S. § 7A-31 3. Petitioner and Guardian ad Litem's Motion for Temporary Stay 4. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas	1. 2. 3. Allowed **10/14/2020** 4.
420A20	State v. Dmarlo Levonne Faulk Johnson	State's Motion to Withdraw and Substitute Counsel (COA19-191-2)	Allowed **08/06/2021** **Berger, J., recused**
424P20	Unifund CCR Partners v. Fred Hoke	Def's PDR Under N.C.G.S. § 7A-31 (COA20-87)	Denied **Berger, J., recused**

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429A20	Shelley Bandy, Plaintiff and Third-Party Defendant State of North Carolina, Intervenor-Plaintiff v. A Perfect Fit for You, Inc.; Margaret A. Gibson; and Ronald Wayne Gibson, Defendants v. A Perfect Fit for You, Inc., Intervenor-Defendant, and Third-Party Plaintiff v. Margaret A. Gibson; Ronald Wayne Gibson; R. Wayne Gibson, Inc., and RW & MA, LLC, Cross-Claim and Third-Party Defendants	Appellants' Motion to Waive Oral Argument	Allowed **09/13/2021**
436PA13-4	I. Beverly Lake, John B. Lewis, Jr., Everette M. Latta, Porter L. McAteer, Elizabeth S. McAteer, Robert C. Hanes, Blair J. Carpenter, Marilyn L. Futrelle, Franklin E. Davis, James D. Wilson, Benjamin E. Fountain, Jr., Faye Iris Y. Fisher, Steve Fred Blanton, Herbert W. Cooper, Robert C. Hayes, Jr., Stephen B. Jones, Marcellus Buchanan, David B. Barnes, Barbara J. Currie, Connie Savell, Robert B. Kaiser, Joan Atwell, Alice P. Nobles, Bruce B. Jarvis, Roxanna J. Evans, Jean C. Narron, and all others similarly situated v. State Health Plan for Teachers and State Employees, a Corporation, Formerly Known as	Motion to Dismiss Appeal	Special Order **08/18/2021** **Newby, C.J., recused**

	the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, Teachers and State Employees' Retirement System of North Carolina, a corporation, Board of Trustees of the Teachers and State Employees' Retirement System of North Carolina, a body politic and corporate, Janet Cowell, in her official capacity as Treasurer of the State of North Carolina, and the State of North Carolina		
448P07-3	State v. Jacobie Quonzel Brockett	1. Def's Pro Se Petition for Writ of Mandamus (COAP19-688) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied 2. Denied
449P11-26	Charles Everette Hinton v. State of North Carolina, et al.	1. Petitioner's Pro Se Motion for Special Proceeding and Suit at Common-Law Action 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus 3. Petitioner's Pro Se Motion for Writ of Error 4. Petitioner's Pro Se Motion for an Equitable Hearing Ex-Parte In Camera in Private 5. Petitioner's Motion for Full Extinguishment and Accounting 6. Petitioner's Pro Se Motion for Discharge and Release from Imprisonment and to Be Compensated Damages	1. Dismissed 2. Denied **09/07/2021** 3. Denied **09/07/2021** 4. Denied **10/04/2021** 5. Denied **10/04/2021** 6. Denied **10/04/2021** **Ervin, J., recused**

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450P20	State v. Clifton William Batts	1. Def's PDR Under N.C.G.S. § 7A-31(COA19-1100) 2. Def's Motion to Amend PDR 3. Def's Pro Se Motion to Withdraw PDR 4. Def's Pro Se Motion for Review 5. Def's Pro Se Motion to Withdraw 6. Def's Motion to Withdraw Petition for Discretionary Review	1. --- 2. --- 3.--- 4.--- 5.--- 6. Allowed
454P20-3	State v. Nafis Akeem-Alim Abdullah-Malik a/k/a Akeem A. Malik	Def's Pro Se Motion to Stay Time for Filing of Petition for Writ of Certiorari	Denied **09/09/2021**
457P19-2	Sharell Farmer v. Troy University, Pamela Gainey, and Karen Tillery	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA19-1015) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Special Order
459A20	In the Matter of K.N. & K.N.	Respondent's Petition for Rehearing	Denied **09/24/2021**
471A20	In the Matter of O.E.M.	1. Petitioner's Motion to Withdraw and Substitute Counsel 2. Petitioner's Motion for Permission of the Court to Participate in Oral Argument 3. Petitioner's Motion in the Alternative for Permission to be Present During Oral Argument	1. Allowed **08/25/2021** 2. Denied **08/28/2021** 3. Allowed **08/28/2021**
482P20	Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, and Rhonda Hall, on behalf of themselves and all others similarly situated v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay (COA19-925) 2. Def's Petition for Writ of Supersedeas 3. Def's Motion to Consolidate Appeals 4. Def's PDR Under N.C.G.S. § 7A-31 5. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **11/24/2020** Dissolved **10/27/2021** 2. Denied 3. Dismissed as moot 4. Denied 5. Dismissed as moot

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483P20	Shari Spector v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay (COA20-13)	1. Allowed **11/24/2020** Dissolved **10/27/2021**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's Motion to Consolidate Appeals	3. Dismissed as moot
		4. Def's PDR Under N.C.G.S § 7A-31	4. Denied
		5. Plt's Conditional PDR Under N.C.G.S § 7A-31	5. Dismissed as moot
486P20	State v. Brenda W. Bryant	Def's PDR Under N.C.G.S. § 7A-31 (COA20-14)	Denied
493A20	In the Matter of B.I.H.	1. Petitioners' Motion to Dispense with Oral Argument	1. Dismissed as moot **10/06/2021**
		2. Respondent-Father's Motion to Stay Further Action or Decision in the Appellate Proceedings for 60 Days	2. Allowed **09/24/2021**
		3. Respondent-Father's Motion to Allow Trial Court to Determine Respondent-Father's and DSS's Rule 60(b) Motion for Relief from TPR Order Against Respondent-Father	3. Allowed **09/24/2021**
		4. Respondent-Father's Motion to Withdraw and Dismiss Appeal	4. Allowed **10/01/2021**
511A20	In the Matter of S.C.C.	Respondent-Mother's Motion to Correct Citations	Allowed **08/19/2021**
533A20	State v. Lewie P. Robinson	Def's Motion to Dismiss Appeal (COA19-474)	Denied **09/08/2021** **Berger, J., recused**
535A20	State v. Ciera Yvette Woods	1. Def's Motion for Temporary Stay (COA19-985)	1. Allowed **12/31/2020**
		2. Def's Petition for Writ of Supersedeas	2. Allowed **08/10/2021**
		3. Def's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR as to Additional Issues	4. Allowed **08/10/2021**
		5. State's Motion to Withdraw and Substitute Counsel	5. Allowed **08/19/2021** **Berger, J., recused**

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563P08-2	State v. Henry Atkins Jennings	Def's Pro Se Motion for Discovery Ipso Facto Laws (COA08-598)	Dismissed
567P04-3	State v. John Darrell Norman, Sr.	Def's Pro Se Motion for Petition for Investigation	Dismissed
580P05-23	In re David Lee Smith	1. Def's Pro Se Emergency Petition for Writ of Mandamus 2. Def's Pro Se Emergency Petition for Writ of Mandamus 3. Def's Pro Se Emergency Motion to Amend Pro Se Petition 4. Def's Pro Se Emergency Petition for Writ of Mandamus 5. Def's Pro Se Emergency Petition for Writ of Mandamus 6. Def's Petition for Writ of Mandamus	1. Denied 2. Denied 3. Dismissed as moot 4. Denied 5. Denied 6. Denied **Ervin, J. recused**

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 3.1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 21, 22, 23, 24, 26, 27, 28, 30, 34, 37, and 39, and Appendixes B, C, D, and F.

* * *

Rule 3.1. Review in Cases Governed by Subchapter I of the Juvenile Code

(a) **Scope**. This rule applies in appeals filed under N.C.G.S. § 7B-1001 and in cases certified for review by the appellate courts in which the right to appeal under this statute has been lost.

(b) **Filing the Notice of Appeal**. Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) ~~and (a1)~~ may take appeal by filing notice of appeal with the clerk of superior court ~~and serving copies of the notice on all other parties~~ in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c) and by serving copies of the notice of appeal on all other parties.

(c) **Expediting the Delivery of the Transcript**. The clerk of superior court must complete the Expedited Juvenile Appeals Form within one business day after the notice of appeal is filed. The court reporting manager of the Administrative Office of the Courts must assign a transcriptionist for the appeal within five business days after the clerk completes the form.

The transcriptionist must produce the transcript of the entire proceedings at the State's expense if there is an order that establishes the indigency of the appellant. Otherwise, the appellant has ten days after the transcriptionist is assigned to contract for the transcription of the entire proceedings. In either situation, the transcriptionist must deliver electronically the transcript to each party to the appeal within forty days after receiving the assignment.

(d) **Expediting the Filing of the Record on Appeal**. The parties may settle the record on appeal by agreement at any time before the record on appeal is settled by any other procedure described in this subsection.

Absent agreement, the appellant must serve a proposed record on appeal on each party to the appeal within fifteen days after delivery of the transcript. Within ten days after having been served with the proposed record on appeal, the appellee may serve on each party to the appeal:

(1) a notice of approval of the proposed record on appeal;

(2) specific objections or amendments to the proposed record on appeal; or

(3) a proposed alternative record on appeal.

If the appellee serves a notice of approval, then this notice settles the record on appeal. If the appellee serves specific objections or amendments, or a proposed alternative record on appeal, then the provisions of Rule 11(c) apply. If the appellee fails to serve a notice of approval, specific objections or amendments, or a proposed alternative record on appeal, then the expiration of the ten-day period to serve one of these documents settles the record on appeal.

The appellant must file the record on appeal within five business days after the record is settled.

(e) **No-Merit Briefs**. When counsel for the appellant concludes that there is no issue of merit on which to base an argument for relief, counsel may file a no-merit brief. The appellant then may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief.

In the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result. Counsel must provide the appellant with a copy of the no-merit brief, ~~the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court~~printed record, transcripts, copies of exhibits and other items included in the record on appeal pursuant to Rule 9(d), and any supplement prepared pursuant to Rule 11(c). Counsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.

(f) ~~**Word-Count Limitations Applicable to Briefs**. Briefs filed in the Supreme Court or in the Court of Appeals must comply with the word-count limitations found in Rule 28(j).~~[Reserved]

(g) **Motions for Extensions of Time**. Motions for extensions of time to produce and deliver the transcript, to file the record on appeal, and to file briefs are disfavored and will be allowed by the appellate courts only in extraordinary circumstances.

(h) **Duty of Trial Counsel**. Trial counsel for the appellant has a duty to assist appellate counsel with the preparation and service of appellant's proposed record on appeal.

(i) **~~Electronic Filing Required~~**. ~~Unless granted an exception for good cause, counsel must file all documents electronically.~~[Reserved]

(j) **Calendaring Priority**. Cases subject to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to this rule shall be disposed of on the record and briefs and without oral argument.

* * *

Rule 5. Joinder of Parties on Appeal

(a) **Appellants**. If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after having timely taken separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, or in a criminal case they may give a joint oral notice of appeal.

(b) **Appellees**. Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder**. After joinder, the parties proceed as a single appellant or appellee. Filing and service of ~~papers~~items by and upon joint appellants or appellees is as provided by Rule 26(e).

* * *

Rule 6. Security for Costs on Appeal

(a) **In Regular Course**. Except in pauper appeals, an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of N.C.G.S. §§ 1-285 and -286.

(b) ***In Forma Pauperis* Appeals**. A party in a civil action may be allowed to prosecute an appeal *in forma pauperis* without providing security for costs in accordance with the provisions of N.C.G.S. § 1-288.

(c) **Filed with Record on Appeal**. When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or make a ~~cash~~monetary deposit ~~made~~ in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security**. For failure of the appellant to provide security as required by subsection (a) or to file evidence thereof as required by subsection (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within ten days after service of the motion upon appellant or before the case is called for argument, whichever first occurs.

(e) **No Security for Costs in Criminal Appeals**. Pursuant to N.C.G.S. § 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

* * *

Rule 7. Transcripts

(a) **Scope**. This rule applies to the ordering, preparation, delivery, and filing of each transcript that is to be designated as part of the record on appeal.

(b) **Ordering by a Party**. A party may order a transcript of any proceeding that the party considers necessary for the appeal.

(1) **Transcript Contract**. A party who orders a transcript for the appeal after notice of appeal is filed or given must use an Appellate Division Transcript Contract form to order the transcript. That form is available on the Supreme Court's rules webpage.

(2) **Service of Transcript Contract**. An appellant must serve its transcript contract on each party and on the transcriptionist no later than fourteen days after filing or giving notice of appeal. An appellee must serve its transcript contract on each party and on the transcriptionist no later than twenty-eight days after any appellant files or gives notice of appeal.

(3) **Transcript Documentation**. A party who has ordered a transcript for the appeal, whether ordered before or after notice of appeal, must complete an Appellate Division

Transcript Documentation form. That form is available on the Supreme Court's rules webpage.

(4) **Service of Transcript Documentation**. A party must serve the transcript documentation on all other parties within the time allowed under subsection (b)(2) of this rule for that party to serve a transcript contract.

(c) **Ordering by the Clerk of Superior Court**. If a party is indigent and entitled to appointed appellate counsel, then that party is entitled to have the clerk of superior court order a transcript on that party's behalf.

(1) **Appellate Entries**. The clerk of superior court must use an appropriate appellate entries form to order a transcript. Those forms are available on the Judicial Branch's forms webpage.

(2) **Service of Appellate Entries**. The clerk must serve the appellate entries on each party and on each transcriptionist no later than fourteen days after a judge signs the form. Service on a party who has appointed appellate counsel must be made upon that party's appointed appellate counsel.

(d) **Formatting**. The transcriptionist must format the transcript according to standards set by the Administrative Office of the Courts.

(e) **Delivery**.

(1) **Deadlines**. The transcriptionist must deliver the transcript to the parties no later than ninety days after having been served with the transcript contract or the appellate entries, except:

a. In a capitally tried case, the deadline is one hundred eighty days.

b. In an undisciplined or delinquent juvenile case under Subchapter II of Chapter 7B of the General Statutes, the deadline is sixty days.

c. In a special proceeding about the admission or discharge of clients under Article 5 of Chapter 122C of the General Statutes, the deadline is sixty days.

(2) **Certification**. The transcriptionist must certify to the parties and to the clerk of superior court that the transcript has been delivered.

(f) **~~Filing.~~** ~~As soon as practicable after the appeal is docketed, the appellant must file each transcript that the parties have designated as part of the record on appeal. Unless granted an exception for good cause, the appellant must file each transcript electronically.~~[Reserved]

(g) **Neutral Transcriptionist**. The transcriptionist must not have a personal or financial interest in the proceeding~~,~~ unless the parties otherwise agree by stipulation.

* * *

Rule 9. The Record on Appeal

(a) **Function; ~~Notice in Cases Involving Juveniles;~~ Composition ~~of Record~~**. In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, ~~the transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9~~. The components of the record on appeal include: the printed record, transcripts, exhibits and other items included in the record on appeal pursuant to Rule 9(d), any supplement prepared pursuant to Rule 11(c) or Rule 18(d)(3), and any additional materials filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

(1) **Composition of the Printed Record in Civil Actions and Special Proceedings**. The printed record ~~on appeal~~ in civil actions and special proceedings shall contain:

a. an index of the contents of the printed record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other ~~papers~~documents showing jurisdiction of the trial court over persons or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the transcript of proceedings is being

filed ~~with the record~~ pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other ~~papers~~documents filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in ~~the transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2)~~another component of the record on appeal;

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is being filed separately~~with the record on appeal; and~~

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior

to the filing of the printed record but has not yet been ruled upon when the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed.;

o. a statement, where appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

p. a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(2) **Composition of the Printed Record in Appeals from Superior Court Review of Administrative Boards and Agencies**. The printed record ~~on appeal~~ in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the printed record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other ~~papers~~documents showing jurisdiction of the board or agency over persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal unless they appear in another component of the record on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented,

or a statement specifying that the transcript of proceedings is being filed ~~with the record~~ pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; ~~and~~

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the printed record but has not yet been ruled upon when the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed~~.~~;

k. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is being filed separately;

l. a statement, where appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

m. a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(3) **Composition of the Printed Record in Criminal Actions.** The printed record ~~on appeal~~ in criminal actions shall contain:

a. an index of the contents of the printed record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire transcript of the proceedings is being filed ~~with the record~~ pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the printed record ~~on appeal~~ immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other ~~papers~~documents filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal~~,~~ unless they appear in ~~the transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2)~~another component of the record on appeal;

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is being filed separately~~with the record on appeal; and~~

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the printed record but has not yet been ruled upon when the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed~~.~~;

n. a statement, where appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

o. a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(b) **Form of Printed Record; Amendments.** The printed record ~~on appeal~~ shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement**. The items constituting the printed record ~~on appeal~~ should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty**. It shall be the duty of counsel for all parties to an appeal to avoid including in the printed record ~~on appeal~~ matter not necessary for an understanding of the issues presented on appeal. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on ~~Papers~~Documents**. Every pleading, motion, affidavit, or other ~~paper~~ document included in the printed record ~~on appeal shall~~should show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination ~~shall~~should show the date on which it was entered. ~~The typed or printed name of the person signing a paper shall be entered immediately below the signature~~.

(4) **Pagination; Counsel Identified**. The pages of the printed record ~~on appeal~~ shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement ~~to the record on appeal~~ shall be numbered consecutively with the pages of the printed record ~~on appeal~~, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record ~~on appeal~~. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the printed record ~~on appeal~~ shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal**.

a. **Additional Materials in the Record on Appeal**. If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a

copy of those items on opposing counsel and shall file the items in a volume captioned "Rule 9(b)(5) Supplement ~~to the Printed Record on Appeal~~." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

b. **Motions Pertaining to Additions to the Record <u>on Appeal</u>**. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal ~~or transcript~~ amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) **Presentation of Testimonial Evidence and Other Proceedings**. Testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the <u>printed</u> record ~~on appeal~~ in the form specified in Rule 9(c)(1) or by designating the transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the <u>printed</u> record ~~on appeal~~.

(1) **When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in <u>Printed</u> Record**. When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the <u>printed</u> record ~~on appeal~~ shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best

calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) **Designation that Transcript of Proceedings in Trial Tribunal Will Be Used**. Appellant may designate in the printed record ~~on appeal~~ that the testimonial evidence will be presented in the transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). When a transcript of those proceedings has been made, appellant may also designate that the transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the transcript that has been made, provided that when the transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the transcript as a proposed alternative record on appeal.

(3) **Transcript of Proceedings—Settlement, Filing, Notice, Briefs**. Whenever a transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the other components of the record on appeal, according to the procedures established by Rule 11;

b. appellant shall ~~cause~~file the transcript ~~to be filed~~ pursuant to ~~Rule 7~~Rule 12 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal ~~and transcript have~~has been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials**. Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the printed record ~~on appeal~~ or may be sent up ~~as documentary exhibits~~ in accordance with Rule 9(d)~~(2)~~.

(5) **Electronic Recordings**. When a narrative or transcript has been produced from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

~~(d) **Exhibits**. Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.~~

~~(1) **Documentary Exhibits Included in the Printed Record on Appeal**. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.~~

~~(2) **Exhibits Not Included in the Printed Record on Appeal**. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing a copy of the exhibit with the clerk of the appellate court. The copy shall be paginated. If multiple exhibits are filed, an index must be included in the filing. A copy that impairs the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.~~

~~(3) [Reserved]~~

~~(4) **Removal of Exhibits from Appellate Court**. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.~~

(d) **Exhibits and Other Items**. Exhibits and other items that have been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be included in the record on appeal under this subsection if a party believes that they are necessary to understand an issue on appeal. To the extent practicable, the parties should include copies of exhibits and copies of other items in the record on appeal rather than originals.

(1) **Copies**. Copies of exhibits and other items that are letter size documents may be included in the printed record or

may be grouped together and presented to the appellate court in one or more separate Rule 9(d) volumes. Each separate volume must be paginated and indexed, and it must display at the top of the first page this notice: "Rule 9(d) Copies of Exhibits and Other Items." Copies of exhibits and other items that are oversized documents or non-documentary items may be presented to the appellate court individually but must be labeled as a copy.

(2) **Originals**. Original exhibits and other original items that have been settled as part of the record on appeal may be relied on by the parties in their briefs and arguments, but they may not be delivered to the appellate court without the appellate court's permission.

a. **Delivering Originals to the Appellate Court**. If a party believes that the appellate court should examine an original exhibit or other original item, then that party must file a motion with the appellate court that asks for permission to deliver the original exhibit or other original item. The movant must explain the relevance of the original exhibit or other original item to the appeal and identify its custodian. If the appellate court allows the motion, then the custodian must promptly deliver the original exhibit or other original item to the clerk of the appellate court in a manner that ensures its security and availability for use in further trial proceedings. If the custodian is not a party, then the clerk of the appellate court must send the appellate court's order allowing the motion to the custodian. The clerk of the appellate court will add the original exhibit or other original item to the case file when the appellate court receives it. Nothing in this subsection precludes the appellate court from ordering the delivery of an original exhibit on its own initiative.

b. **Removing Originals from the Appellate Court**. A custodian who has delivered an original exhibit or other original item to the appellate court must remove it at the direction of the clerk of the appellate court. If the custodian does not remove the original exhibit or other original item as directed, then the clerk of the appellate court may dispose of it.

* * *

Rule 10. Preservation of Issues at Trial; Proposed Issues on Appeal

(a) **Preserving Issues During Trial Proceedings**.

(1) **General**. In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2) **Jury Instructions**. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence**. In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4) **Plain Error**. In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b) **Appellant's Proposed Issues on Appeal**. Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the printed record ~~on appeal~~ in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

(c) **Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law**. Without taking an appeal, an appellee may list proposed issues on appeal in the printed record ~~on appeal~~ based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief. Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the transcript of proceedings, if one is filed under Rule 9(c)(2).

* * *

Rule 11. Settling the Record on Appeal

(a) **By Agreement**. Within forty-five days after all of the transcripts that have been ordered according to Rule 7 are delivered (seventy days in capitally tried cases) or forty-five days after the last notice of appeal is filed or given, whichever is later, the parties may by agreement entered in the printed record ~~on appeal~~ settle a proposed record on appeal that has been prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in capitally tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. Within thirty days (thirty-five days in capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate ~~paper~~document and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall ~~consist of~~ include each item that is either among those items required by Rule 9(a)

~~to be in the record on appeal~~ or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. ~~If~~Additionally, if a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item ~~shall not be included in the printed record on appeal, but~~ shall be filed by the appellant ~~with the printed record on appeal~~ in a volume captioned "Rule 11(c) Supplement~~ to the Printed Record on Appeal," along with any transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules;~~ provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included in the record on appeal. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties ~~as would items in the printed record on appeal~~like any other component of the record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement ~~to the printed record on appeal~~ shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the

appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial-settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal**. When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the

judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 12. Filing the Record on Appeal; Docketing the Appeal; Copies ~~of the Record~~

(a) **Time for Filing Record on Appeal**. ~~Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.~~The appellant must file the record on appeal no later than fifteen days after it has been settled by any of the procedures provided in Rule 11 or Rule 18. This deadline applies only to the printed record, transcripts, copies of exhibits and other items included in the record on appeal pursuant to Rule 9(d), and any supplement prepared pursuant to Rule 11(c) or Rule 18(d)(3). This deadline does not apply to original exhibits and other original items included in the record on appeal, which are subject to the delivery and removal procedures in Rule 9(d)(2).

(b) **Docketing the Appeal**. ~~At the time of filing the record on appeal, the~~The appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal *in forma pauperis* as provided in N.C.G.S. §§ 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies ~~of Record on Appeal~~**. ~~The appellant shall file one copy of the printed record on appeal, one copy of each exhibit designated pursuant to Rule 9(d), one copy of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3), and one copy of any deposition or administrative hearing transcript. The appellant is encouraged to file each of these documents electronically, if permitted to do so by the electronic-filing site. Unless granted an exception for good cause, the appellant shall file one copy of each transcript that the parties have designated as part of the record on appeal electronically~~

~~pursuant to Rule 7.~~ The clerk will reproduce and distribute copies of the printed record ~~on appeal~~ as directed by the court, billing the parties pursuant to these rules.

* * *

Rule 13. Filing and Service of Briefs

(a) **Time for Filing and Service of Briefs**.

(1) **Cases Other Than Death Penalty Cases**. Within thirty days after the record on appeal has been filed with the appellate court, the appellant shall file a brief in the office of the clerk of the appellate court and serve copies thereof upon all other parties separately represented. Within thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(2) **Death Penalty Cases**. Within sixty days after the record on appeal has been filed with the Supreme Court, the appellant in a criminal appeal which includes a sentence of death shall file a brief in the office of the clerk and serve copies thereof upon all other parties separately represented. Within sixty days after appellant's brief has been served, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(b) **Copies Reproduced by Clerk**. ~~A party need file but a single copy of a brief. At the time of filing the~~A party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the party's brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) **Consequence of Failure to File and Serve Briefs**. If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve its brief within the time allowed, the appellee may not be heard in oral argument except by permission of the court.

* * *

Rule 14. Appeals of Right from Court of Appeals to Supreme Court under N.C.G.S. § 7A-30

(a) **Notice of Appeal; Filing and Service**. Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices

of appeal with the clerk of the Court of Appeals and with the clerk of the Supreme Court and serving notice of appeal upon all other parties within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chair of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) **Content of Notice of Appeal**.

(1) **Appeal Based Upon Dissent in Court of Appeals**. In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under N.C.G.S. § 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question**. In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal**.

(1) **Composition**. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies**. Upon the filing of a notice of appeal, the clerk of the Court of Appeals will forthwith transmit the original record on appeal to the clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction.

(d) **Briefs**.

(1) **Filing and Service; Copies**. Within thirty days after filing notice of appeal in the Supreme Court, the appellant shall file with the clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those issues upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within thirty days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within thirty days after service of the appellant's brief upon appellee, the appellee shall similarly file and serve copies of a new brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

~~The parties need file but single copies of their respective briefs.~~ The clerk will reproduce and distribute copies <u>of the briefs</u> as directed by the Court, billing the parties pursuant to these rules.

(2) **Failure to File or Serve**. If an appellant fails to file or serve its brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed, it may not be heard in oral argument except by permission of the Court.

* * *

Rule 15. Discretionary Review on Certification by Supreme Court under N.C.G.S. § 7A-31

(a) **Petition of Party**. Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in N.C.G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes, or in valuation of exempt property under Chapter 1C of the General Statutes.

(b) **Petition of Party—Filing and Service**. A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

(c) **Petition of Party—Content**. The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under N.C.G.S. § 7A-31 for discretionary review. The petition shall state each issue for which review is sought and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required, but supporting authorities may be set forth briefly in the petition.

(d) **Response**. A response to the petition may be filed by any other party within ten days after service of the petition upon that party. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall be stated in the response. A motion for extension of time is not permitted.

(e) **Certification by Supreme Court—How Determined and Ordered.**

(1) **On Petition of a Party**. The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court**. The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to N.C.G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service**. Any determination to certify for review and any determination not to certify made in response to a petition will be recorded by the Supreme Court in a written order. The clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the clerk of the Supreme Court.

(f) **Record on Appea**l.

(1) **Composition**. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies**. When an order of certification is filed with the clerk of the Court of Appeals, he or she will forthwith transmit the original record on appeal to the clerk of the Supreme Court. The clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the clerk may require a deposit by the petitioner to cover the costs thereof.

(g) **Filing and Service of Briefs**.

(1) **Cases Certified Before Determination by Court of Appeals**. When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed its brief in the Court of Appeals and served copies before the case is certified, the clerk of the Court of Appeals shall forthwith transmit to the clerk of the Supreme Court the original brief and any copies already reproduced for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed its brief in the Court of Appeals and served copies before the case is certified, the party shall file its brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. An appellant may file and serve a reply brief as provided in Rule 28(h).

(3) **Copies**. ~~A party need file, or the clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review.~~ The clerk of the

Supreme Court will ~~thereupon procure from the Court of Appeals or will~~ reproduce copies of the briefs for distribution as directed by the Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief. In civil appeals *in forma pauperis* a party need not pay the deposit for reproducing copies~~, but at the time of filing its original new brief shall also deliver to the clerk two legible copies thereof~~.

(4) **Failure to File or Serve**. If an appellant fails to file and serve its brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed by this Rule 15, it may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders**. An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined**. As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee" means a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an appellant or appellee for purposes of proceeding under this Rule 15.

* * *

Rule 17. Appeal Bond in Appeals Under N.C.G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right**. In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal

shall, upon filing the notice of appeal in the Supreme Court, file with the clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or make a monetary deposit ~~cash~~ in lieu thereof, to the effect that all costs awarded against the appealing party on the appeal will be paid.

(b) **Discretionary Review of Court of Appeals Determination**. When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subsection (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination**. When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals *In Forma Pauperis***. No undertakings for costs are required of a party appealing *in forma pauperis*.

* * *

Rule 18. Taking Appeal; Record on Appeal—Composition and Settlement

(a) **General**. Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) **Time and Method for Taking Appeals**.

(1) The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise, in which case the General Statutes shall control.

(2) Any party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the

administrative tribunal. The final decision of the administrative tribunal is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final administrative tribunal decision from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made as part of the process leading up to the final administrative tribunal decision, then the parties may order transcripts using the procedures applicable to court proceedings in Rule 7.

(c) **Composition of Printed Record ~~on Appeal~~**. The printed record ~~on appeal~~ in appeals from any administrative tribunal shall contain:

(1) an index of the contents of the printed record ~~on appeal~~, which shall appear as the first page thereof;

(2) a statement identifying the administrative tribunal from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other ~~papers~~documents showing jurisdiction of the administrative tribunal over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other ~~papers~~documents required by law or rule to be filed with the administrative tribunal to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the administrative tribunal from which appeal was taken;

(6) so much of the litigation before the administrative tribunal or before any division, commissioner, deputy

commissioner, or hearing officer of the administrative tribunal, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the transcript of proceedings is being filed ~~with the record~~ pursuant to Rule 9(c)(2) and (3);

(7) when the administrative tribunal has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the administrative tribunal, copies of all items included in the record filed with the administrative tribunal which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other ~~papers~~documents filed and statements of all other proceedings had before the administrative tribunal or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all issues presented on appeal~~,~~ unless they appear in ~~the transcript of proceedings being filed pursuant to Rule 9(c)(2) and (3)~~another component of the record on appeal;

(9) a copy of the notice of appeal from the administrative tribunal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal ~~and settling the transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3)~~;

(10) proposed issues on appeal relating to the actions of the administrative tribunal, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is being filed separately ~~with the record on appeal~~; ~~and~~

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the printed record but has not yet been ruled upon when

the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed.;

(14) a statement, when appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

(15) a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(d) **Settling the Record on Appeal**. The record on appeal may be settled by any of the following methods:

(1) **By Agreement**. Within forty-five days after all of the transcripts that have been ordered according to Rule 7 and Rule 18(b)(3) are delivered or forty-five days after the last notice of appeal is filed, whichever is later, the parties may by agreement entered in the printed record ~~on appeal~~ settle a proposed record on appeal that has been prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate ~~paper~~document and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial

settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.** If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall ~~consist of~~include each item that is either among those items required by Rule 18(c) ~~to be in the record on appeal~~ or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. ~~If~~Additionally, if a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item ~~shall not be included in the printed record on appeal, but~~ shall be filed by the appellant ~~with the record on appeal~~ in a volume captioned "Rule 18(d)(3) Supplement~~ to the Printed Record on Appeal,"~~ ~~along with any transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules~~; provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included in the record on appeal. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties ~~as would items in the printed record on appeal~~like any other component of the record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on

appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement ~~to the printed record on appeal~~ shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the printed record ~~on appeal~~, the first page of the supplement to bear the next consecutive number following the number of the last page of the printed record ~~on appeal~~. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the administrative tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the administrative tribunal convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the administrative tribunal, shall be served upon all other parties. Each party shall promptly provide to the administrative tribunal a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the administrative tribunal in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for

consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the administrative tribunal shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the administrative tribunal. The administrative tribunal or a delegate appointed in writing by the administrative tribunal shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the administrative tribunal. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the administrative tribunal is a party to the appeal, the administrative tribunal shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by administrative tribunal decision.

(e) **Further Procedures and Additional Materials in the Record on Appeal.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 21. Certiorari

(a) **Scope of the Writ**.

(1) **Review of the Judgments and Orders of Trial Tribunals**. The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals**. The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ—to Which Appellate Court Addressed**. Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting ~~papers~~items. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post-conviction Matters—to Which Appellate Court Addressed**. Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court. If the petition is without merit, it shall be denied by the court.

(f) **Petition for Writ in Post-conviction Matters—Death Penalty Cases**. A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within thirty days of service of the petition.

* * *

Rule 22. Mandamus and Prohibition

(a) **Petition for Writ—to Which Appellate Court Addressed**. Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of

service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court**. Within ten days after service of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting ~~papers~~items. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

* * *

Rule 23. Supersedeas

(a) **Pending Review of Trial Tribunal Judgments and Orders**.

(1) **Application—When Appropriate**. Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken, or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (1) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (2) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Application—How and to Which Appellate Court Made**. Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except when an appeal from a superior court is initially

docketed in the Supreme Court, no petition will be entertained by the Supreme Court unless application has been made first to the Court of Appeals and denied by that court.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions**. Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed with the clerk of the court to which application is being made and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and denied or vacated by that court, or shall contain facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under N.C.G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus, or prohibition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting ~~papers~~items. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay**. Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by a separate ~~paper~~filing, for an order temporarily staying enforcement or execution

of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by a separate ~~paper~~filing, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

* * *

Rule 24. ~~Form of Papers; Copies~~[Reserved]

~~A party should file with the appellate court a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.~~

* * *

Rule 26. Filing and Service

~~(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this rule.~~

~~(1) **Filing by Mail**. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, the record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.~~

~~(2) **Filing by Electronic Means**. Filing in the appellate courts may be accomplished by electronic means by use of the electronic-filing site at https://www.ncappellatecourts.org. Many documents may be filed electronically through the use of this site. The site identifies those types of documents that may not be filed electronically. A document filed by use of the electronic-filing site is deemed filed as of the time that the document is received electronically. Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. In all cases in which a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the~~

~~applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission, and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic filing site at https://www.ncappellatecourts.org, counsel may either have his or her account drafted electronically by following the procedures described at the electronic-filing site, or counsel must forward the applicable filing fee for the document by first class mail, contemporaneously with the transmission~~.

(a) **Filing**. Counsel must file documents in the appellate courts electronically. The electronic-filing site for the appellate courts is located at https://www.ncappellatecourts.org. If a technical failure prevents counsel from filing a document by use of the electronic-filing site, then the clerk of the appellate court may permit the document to be filed by hand delivery, mail, or fax. Counsel may file copies of oversized documents and non-documentary items electronically if permitted to do so by the electronic-filing site, but otherwise by hand delivery or mail.

A person who is not represented by counsel is encouraged to file items in the appellate courts electronically but is not required to do so. A person not represented by counsel may file items by hand delivery or mail.

An item is filed in the appellate court electronically when it is received by the electronic-filing site. An item is filed in paper when it is received by the clerk, except that motions, responses to petitions, the record on appeal, and briefs filed by mail are deemed filed on the date of mailing as evidenced by the proof of service.

(b) **Service ~~of All Papers~~ Required**. Copies of all ~~papers~~items filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service**. Service may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original ~~paper~~item is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the ~~paper~~item enclosed in a postpaid, properly addressed wrapper in a post office or official depository under

the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.

(d) **Proof of Service**. ~~Papers~~Items presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the ~~papers~~ items filed.

(e) **Joint Appellants and Appellees**. Any ~~paper~~item required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately**. When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any ~~papers~~items required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such ~~a paper~~an item and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Documents Filed with Appellate Courts.**

(1) **Form of ~~Papers~~Documents**. ~~Papers~~Documents composed for an appeal and presented to either appellate court for filing shall be letter size (8½ x 11") ~~with the exception of wills and exhibits. All printed matter must appear in font~~Documents shall be prepared using a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size~~, using a proportionally spaced font with serifs~~. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. ~~Unglazed white paper of 16- to 20-pound substance should be utilized so as to produce a clear, black image, leaving a margin of approximately one inch on each side.~~ The body of text shall be presented with double spacing between each line of text.

Lines of text shall be no wider than 6½ inches, leaving a margin of approximately one inch on each side. The format of all ~~papers~~documents presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) **Index Required**. ~~All documents~~Documents composed for an appeal and presented to either appellate court, other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) **Closing**. The body of ~~the document~~a document composed for an appeal shall at its close bear the printed name, post office address, telephone number, State Bar number, and e-mail address of counsel of record, and in addition, at the appropriate place, the ~~manuscript~~ signature of counsel of record. ~~If the document has been filed electronically by use of the electronic-filing site at https://www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.~~

* * *

Rule 27. Computation and Extension of Time

(a) **Computation of Time**. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

(b) **Additional Time After Service**. Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other ~~paper~~item and the notice or ~~paper~~item is served by mail, or by e-mail if allowed by these rules, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted**. Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules, or by order of court, for doing any act required or allowed under these rules, or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division**. The trial tribunal for good cause shown by the appellant may extend once, for no more than thirty days, the time permitted by: (1) Rule 7 for a transcriptionist to deliver a transcript; and (2) Rule 11 or Rule 18 for service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division**. All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may be made only to the appellate court to which appeal has been taken.

(d) **Motions for Extension of Time; How Determined**. Motions for extension of time made in any court may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time; provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard.

* * *

Rule 28. Briefs—Function and Content

(a) **Function**. The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court

and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned.

(b) **Content of Appellant's Brief**. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the printed record ~~on appeal~~ shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in ~~the transcript of proceedings,~~ the record on appeal~~, or exhibits, as the case may be~~.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not

presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues**. An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review, the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative

summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs**. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement ~~to the printed record on appeal,~~ the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required**. Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such

evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required**. An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement ~~to the printed record on appeal~~ that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement ~~to the printed record on appeal~~ as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of ~~clear photocopies~~copies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record on Appeal**. References in the briefs to parts of the printed record ~~on appeal and to parts of the transcript or parts of documentary exhibits~~, transcripts, documents included in the record on appeal pursuant to Rule 9(d), or supplements shall be to the pages in such filings where those portions appear.

(f) **Joinder of Multiple Parties in Briefs**. Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities**. Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the

authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs**. Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

(i) **Amicus Curiae Briefs**. An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.

(1) **Motion**. To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.

(2) **Brief**. The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.

(3) **Time for Filing**. If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.

(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.

(5) **Action by Court**. Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.

(6) **Reply Briefs**. A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.

(7) **Oral Argument**. The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals**. Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules. A principal brief may contain no more than 8,750 words. A reply brief may contain no more than 3,750 words. An amicus curiae brief may contain no more than 3,750 words.

(1) **Portions of Brief Included in Word Count**. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

(2) **Certificate of Compliance**. Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Rule 30. Oral Argument and Unpublished Opinions

(a) **Order and Content of Argument**.

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the

written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) In matters listed in Rule 42(b), counsel must use initials or a pseudonym in oral argument instead of the minor's name.

(b) **Time Allowed for Argument**.

(1) **In General**. Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited.

Counsel is not obliged to use all the time allowed, and should avoid unnecessary repetition; the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel**. Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties**. If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) ~~**Submission on Written Briefs**. By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.~~ **Argument Conducted by Audio and Video Transmission**. The appellate courts may deviate from traditional in-person oral argument and instead require that oral argument be conducted by audio and video transmission. A party may move the court to conduct oral argument by audio and video transmission but must explain in its motion why the request is being made.

(e) **Unpublished Opinions**.

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the opinions web page of the Court of Appeals at https://appellate.nccourts.org/opinion-filings/coa and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and pro se parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and pro se parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or pro se parties of record must be filed within five days after service of the motion requesting

publication. The panel that heard the case shall determine whether to allow or deny such motion.

(f) ~~**Pre-Argument Review;**~~ **Decision of Appeal Without Oral Argument**.

(1) At any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs. Counsel will be notified not to appear for oral argument.

(3) By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.

* * *

Rule 34. Frivolous Appeals; Sanctions

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other ~~paper~~item filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under subsection (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

* * *

Rule 37. Motions in Appellate Courts

(a) **Time; Content of Motions; Response**. An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other ~~papers~~items, these shall be served and filed with the motion. Within ten days after a motion is served or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other ~~papers~~items in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination**. Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties and without awaiting a response thereto. A party who has not received actual notice of such a motion, or who has not filed a response at the time such action is taken, and who is adversely affected

by the action may request reconsideration, vacation, or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) ~~[Reserved]~~**Notification and Consent**. In cases where all parties are represented by counsel, motions should contain a statement by counsel reporting counsel's good-faith effort to inform counsel for all other parties of the intended filing of the motion. The statement should indicate (i) whether the other parties consent to the relief being sought and (ii) whether any other party intends to file a response.

(d) **Withdrawal of Appeal in Criminal Cases**. Withdrawal of appeal in criminal cases shall be in accordance with N.C.G.S. § 15A-1450. In addition to the requirements of N.C.G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) **Withdrawal of Appeal in Civil Cases.**

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) **Effect of Withdrawal of Appeal**. The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

* * *

Rule 39. Duties of Clerks; When Offices Open

(a) **General Provisions**. The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The

courts shall be deemed always open for the purpose of filing any proper ~~paper~~item and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Records to Be Kept**. The clerk of each of the courts of the appellate division shall keep and maintain the records of that court on paper, microfilm, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion, and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

* * *

Appendix B. Format and Style

~~All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16- to 20-pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.~~

Documents composed for an appeal and presented to either appellate court for filing shall be formatted and styled as described in this appendix.

GENERAL REQUIREMENTS

Documents shall be letter size (8½ x 11"). ~~Papers~~Documents shall be prepared using ~~font~~a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size~~using a proportionally spaced font with serifs~~. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia, Century, Century Schoolbook, and Century Old Style typeface. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

~~All documents to be filed in either appellate court~~Documents shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by Rule 42; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(NAME OF PLAINTIFF)	)	FROM (NAME) COUNTY
	)	
v	)	No. _____
	)	
(NAME OF DEFENDANT)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named except as provided by Rule 42) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a component of the record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial

division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5" line. The form of the index for a printed record ~~on appeal~~ should be as follows (indexes for briefs are addressed in Appendix E):

(Printed Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions of the printed record ~~on appeal~~ that correspond to the items asterisked (*) in the sample index above would be omitted if the transcript option were selected under Rule 9(c). In their place, counsel should insert a statement in substantially the following form:

> "Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), transcriptionist, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is ~~electronically~~ filed pursuant to ~~Rule 7~~Rule 12."

Entire transcripts should not be inserted into the printed record ~~on appeal, but rather should be electronically filed by the appellant pursuant to Rule 7~~. Transcript pages inserted into the printed record ~~on appeal~~ will be treated as a narration and will be printed at the standard page charge. Counsel should note that transcripts will not be reproduced with the printed record ~~on appeal~~, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

Paragraphs within the body of the printed record ~~on appeal~~ should be single-spaced, with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important because the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made using a parenthetical in the text: (R pp 38-40). References to the transcript, if used, should be made in a similar manner: (T p 558, line 21).

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase Roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by Arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed pro se, ~~all original papers~~documents filed in a case will bear the ~~original~~ signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the ~~paper~~document, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]

By: _____
[Name]
By: _____
[Name]
Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed) _____
[Name]
Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

* * *

Appendix C. ~~Arrangement of Record on Appeal~~[Reserved]

~~Only those items listed in the following tables and that are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions for including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the printed record if the transcript option of Rule 9(c) is used and a transcript of the items exists.~~

~~Table 1~~
~~SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE~~

~~1. Title of action (all parties named) and case number in caption, per Appendix B~~
~~2. Index, per Rule 9(a)(1)a~~
~~3. Statement of organization of trial tribunal, per Rule 9(a)(1)b~~
~~4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c~~
~~5. Complaint~~
~~6. Pre-answer motions of defendant, with rulings thereon~~
~~7. Answer~~

8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pretrial order
*10. Plaintiff's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items, including Notice of Appeal, required by Rule 9(a)(1)i
21. Statement of transcript option as required by Rule 9(a)(1)i and 9(a)(1)l
22. Statement required by Rule 9(a)(1)m when a record supplement will be filed
23. Entries showing settlement of record on appeal, extensions of time, etc.
24. Proposed Issues on Appeal per Rule 9(a)(1)k
25. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY DECISION

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(2)a
3. Statement of organization of superior court, per Rule 9(a)(2)b
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence
*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court

10. Items required by Rule 9(a)(2)h
11. Entries showing settlement of record on appeal, extensions of time, etc.
12. Proposed issues on appeal, per Rule 9(a)(2)i
13. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(3)a
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. *Voir dire* of jurors
*10. State's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
11. Motions at close of State's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f and 10(a)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extensions of time, etc.
22. Proposed issues on appeal, per Rule 9(a)(3)j
23. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

~~**Table 4**~~

~~**PROPOSED ISSUES ON APPEAL**~~

~~A. Examples related to pretrial rulings in civil actions~~

~~1. Did the trial court err in denying defendant's motion to dismiss for lack of personal jurisdiction under N.C. R. Civ. P. 12(b)(2)?~~

~~2. Did the trial court err in denying defendant's motion to dismiss for failure to state a claim upon which relief may be granted under N.C. R. Civ. P. 12(b)(6)?~~

~~3. Did the trial court err in denying defendant's motion to require plaintiff to submit to an independent physical examination under N.C. R. Civ. P. 35?~~

~~4. Did the trial court err in denying defendant's motion for summary judgment under N.C. R. Civ. P. 56?~~

~~B. Examples related to civil jury trial rulings~~

~~1. Did the trial court err in admitting the hearsay testimony of E.F.?~~

~~2. Did the trial court err in denying defendant's motion for a directed verdict?~~

~~3. Did the trial court err in instructing the jury on the doctrine of last clear chance?~~

~~4. Did the trial court err in instructing the jury on the doctrine of sudden emergency?~~

~~5. Did the trial court err in denying defendant's motion for a new trial?~~

~~C. Examples related to civil non-jury trials~~

~~1. Did the trial court err in denying defendant's motion to dismiss at the close of plaintiff's evidence?~~

~~2. Did the trial court err in its finding of fact No. 10?~~

~~3. Did the trial court err in its conclusion of law No. 3?~~

* * *

Appendix D. Forms

Captions for all documents filed in the appellate division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

NOTICES OF APPEAL

(1) To Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in (District)(Superior) Court, _____ County, (describing it).

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(2) To Supreme Court from a Judgment of the Superior Court Including a Sentenceof Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment entered by (name of Judge) in Superior Court, _____ County, on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(3) To Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under N.C.G.S. § 7A-30. The appealing party shall enclose a clear copy of the opinion of

the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . . .

(Constitutional question—N.C.G.S. § 7A-30(1)) . . . directly involves a substantial question arising under the Constitution(s) (of the United States)(and)(or)(of the State of North Carolina) as follows:

(Here describe the specific issues, citing constitutional provisions under which they arise and showing how such issues were timely raised below and are set out in the record of appeal, e.g.:

Issue 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's challenge to the denial of (his)(her) Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of the constitutional right to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7–10). This constitutional issue was determined erroneously by the Court of Appeals.)

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—N.C.G.S. § 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues that are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues. Any additional issues desired to be raised in the Supreme Court when the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31

To seek review of the opinion and judgment of the Court of Appeals when petitioner contends the case involves issues of public interest or jurisprudential significance. May also be filed as a separate ~~paper~~ document in conjunction with a notice of appeal to the Supreme Court when the appellant contends that such appeal lies of right due to substantial constitutional questions under N.C.G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from N.C.G.S. § 7A-31 that provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal arguments to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is significant to the jurisprudence of the State or of significant public interest. If the Court is persuaded to take the case, the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to Be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those that are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

PETITION FOR WRIT OF CERTIORARI

To seek review: (1) by the appropriate appellate court of judgments or orders of trial tribunals when the right to prosecute an appeal has been lost or when no right to appeal exists; and (2) by the Supreme Court of decisions and orders of the Court of Appeals when no right to appeal or to petition for discretionary review exists or when such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the Rules

of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; non-appealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from court reporter, statement should include estimate of date of availability and supporting affidavit from the court reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments to justify issuance of writ: e.g., reasons why interlocutory order makes it impracticable for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed issues, etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [(Superior)(District) Court, _____ County] [North Carolina Court of Appeals] to permit review of the (judgment) (order)(decree) above specified, upon issues stated as follows: (here list the issues, in the manner provided for in the petition for discretionary review); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of service upon opposing parties)

(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in the petition.)

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay under Rule 23(e) is appropriate to seek an immediate stay of execution on an *ex parte* basis pending the Court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under N.C.G.S. § _____ inadequate; trial judge has refused to stay execution upon motion therefor by petitioner; circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments for justice of issuing the writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if it is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court, _____ County)] [North Carolina Court of Appeals] staying (execution)(enforcement) of its (judgment)(order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (appeal)(discretionary review)(review by extraordinary writ) (now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of Service upon opposing party)

Rule 23(e) provides that in conjunction with a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included as part of the main petition or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)(order) (decree) that is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should

promptly apply for such a stay after the judgment of the superior court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court, _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to N.C.G.S. § 15A-2000(d)(1), there is an automatic appeal of this matter to the Supreme Court of North Carolina, and defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the date scheduled for execution.

WHEREFORE, the defendant prays the Court to enter an order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

* * *

Appendix F. Fees and Costs

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. A fee payment is due when the document to which it pertains is filed and must be submitted to the clerk of the appropriate appellate court. A person may submit payment for an applicable fee by hand delivery or mail.

There is no fee for filing a motion in a cause; other fees are as follows ~~and should be submitted with the document to which they pertain, made payable to the clerk of the appropriate appellate court~~:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e., docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

An appeal bond or ~~cash~~a monetary deposit of $250.00 is required in civil cases per Rules 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the court allows the petition.

Costs for printing documents are $1.75 per printed page. The appendix to a brief under the transcript option of Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief. Both appellate courts will bill the parties for the costs of printing their documents.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed, or when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first twenty-five pages and $.20 for each page thereafter.

The fee for a certified copy of an appellate court decision, in addition to photocopying charges, is $10.00.

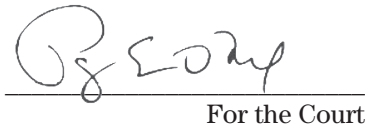
* * *

These amendments to the North Carolina Rules of Appellate Procedure become effective on 1 January 2022 and apply to cases that are appealed on or after that date.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

RULES OF APPELLATE PROCEDURE

Ordered by the Court in Conference, this the 13th day of October 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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